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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1940~~ 1941

No. ~~603~~ 18

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS
COAL DIVISION OF THE DEPARTMENT OF THE
INTERIOR, ET AL., PETITIONERS

VS.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 30, 1940
CERTIORARI GRANTED JANUARY 6, 1941

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 603

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS
COAL DIVISION OF THE DEPARTMENT OF THE
INTERIOR, ET AL., PETITIONERS

vs.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

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1 Before the National Bituminous Coal Commission

In re Application Under Provisions of Section 4-A of the Bituminous Coal Act of 1937 of Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, for Exemption

Application for exemption

Aug. 4, 1937

The undersigned, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company (hereinafter called "Applicants"), pursuant to the provisions of Section 4-A of the Bituminous Coal Act of 1937, file with the Honorable The National Bituminous Coal Commission this, the Applicants', verified petition for exemption from the provisions of Section 4 of said Act, and respectfully show herein as follows:

1. That under and pursuant to orders of the United States District Court for the Eastern District of Virginia, filed in the cause therein pending entitled "Guaranty Trust Company of New York and Merrel P. Callaway, as trustees, et al., Complainants, against Seaboard Air Line Railway Company, et al., Defendants," Consolidated Cause in Equity No. 214, and in the Constituent Causes numbered 213, 214, 228, and 229 of said Consolidated Cause, Applicants are the duly appointed and acting Receivers of the property and assets of Seaboard Air Line Railway Company. Certified copy of order of said Court, filed on December 23,

1930, in said Constituent Cause No. 213 appointing the undersigned Legh R. Powell, Jr., as such Receiver, and certified copy of order of said Court filed on December 30, 1932, in said Consolidated Cause No. 214 and in said Constituent Causes thereof, appointing the undersigned Henry W. Anderson as such Receiver, have heretofore, and as hereinafter set forth, been filed with the National Bituminous Coal Commission.

2. That under said orders of said Court Applicants were authorized and directed to take possession of and to manage and operate, and are now in possession of and are continuing to manage and operate, the railroads, properties, and assets of said Seaboard Air Line Railway Company.

3. That in their operation of said railroads and properties under and pursuant to said court orders, and in order to secure a dependable source of supply, owned and controlled by Applicants, from which to obtain the coal, or a large portion thereof, used by them in such operation, Applicants several years prior

to the effective date of the Bituminous Coal Act of 1937 acquired by appropriate instrument of conveyance from the respective landowners, and owned and since said date have owned, and now own, the exclusive right to extract and mine for Applicants' own use and consumption in their operation of said railroad and properties, the coal in, on or under those certain boundaries or tracts of coal bearing lands at what are respectively known as "William-Ann" Mine, located in Mingo County, West Virginia, "Chilton Block No. 1" Mine, located in Logan County, West Virginia, and "Glamorgan" Mine, located in Wise County, Virginia, all of said mines being located in District No. 8 of the Districts organized under the provisions of Section 4 of the Bituminous Coal Act of 1937.

4. That Applicants have heretofore for several years prior to the effective date of the Bituminous Coal Act of 1937 employed, have since said date employed and now employ, certain individuals to perform for Applicants at and for an agreed compensation paid by Applicants to such individuals, the work and service of extracting mining and loading on railroad cars at the mine tipples, for shipment to Applicants and for use and consumption exclusively by Applicants in their operation of said railroads and properties, the coal in, on or under said tracts or boundaries of land so owned by Applicants; said individuals performing said work and service for Applicants at said mines, respectively, being as follows:

William-Ann Mine—D. H. Pritchard.

Chilton Block No. 1. Mine—D. H. Pritchard.

Glamorgan Mine—A. E. Stone and Walter C. Shunk, as Receivers of Glamorgan Coals, Incorporated.

5. That the said coal so extracted, mined, and loaded by said individuals at each and every of said three mines is, in each case, coal owned by and the property of Applicants, is coal consumed by Applicants and is coal which is shipped by said individuals, acting for and as the agent of Applicants, to Applicants for use and consumption by Applicants in their operation of said railroads and properties.

6. Applicants state and assert that they are the producers at each of said mines of the aforesaid coal produced thereat within the meaning and intent of the Bituminous Coal Act of 1937, and are included in the term "producer," as that term is defined by Section 17, paragraph (c), of said Act, and that Applicants, the said coal produced at each of said three mines and the transactions and commerce in said coal, are, under and by virtue of the provisions of Section 4 (1) of Said Act,

specifically exempted from all of the provisions of Section 4 of said Act.

7. Applicants further state and assert that under and by virtue of said specific exemption provided for in said Section 4 (1), that they and the said coal and said transactions and commerce in said coal, are also, and irrespective and independent of their acceptance, heretofore filed as hereinafter stated, of membership in the Code promulgated under said Act, exempted from the tax imposed by Section 3 (b) of said Act by the provisions of said Section 3 (b).

8. Applicants also state and assert, in support of and as their further claim to exemption from the obligations, duties, or liabilities imposed by Section 4 of said Bituminous Coal Act of 1937, that the provisions of Section 4 of said Act have no application to Applicants, or to the coal produced from said mines, or any thereof, or to the transactions and commerce in said coal, in that said Section 4 relates and applies only to coal which is sold or the title to which is otherwise transferred, and to transactions and commerce in coal which involve the sale or other transfer of the title to said coal.

9. Applicants state and assert that no sale or other transfer of title by Applicants, or by the said individuals performing said work and service for Applicants, of the said coal produced at and shipped to Applicants from any of said mines, occurs or is made; but said coal so extracted, mined and shipped is the sole and exclusive property of Applicants and is coal consumed by Applicants and transported by them to themselves for consumption by them in their operation of said railroad and properties.

10. Applicants further state that in order to protect and fully preserve the rights of Applicants and of the receivership estate of Seaboard Air Line Railway Company, Applicants heretofore, on the 21st day of July 1937, filed with the National Bituminous Coal Commission acceptance by them of membership in the Bituminous Coal Code promulgated under the provisions of the Bituminous Coal Act of 1937; that Applicants felt, and still feel, and claim and assert, that the filing by them of such acceptance was not necessary or required but that such acceptance was filed by them as a precautionary procedure and, by virtue of the provisions of Section 3 (f) of said Act, without any preclusion or estoppel of Applicants from contesting the constitutionality of any of the provisions of said Act or of said Code, or of the validity or application either to Applicants or to any part of the said coal produced at said three mines; that a copy of

6 said acceptance by Applicants was filed with E. C. Mahan, Acting District Secretary for District No. 8, Knoxville, Tenn., together with certified copies of the aforesaid orders of the United States District Court for the Eastern District of Virginia, and that in connection with said acceptance Applicants have heretofore also filed certified copies of said Court orders with the National Bituminous Coal Commission.

11. That Applicants further claim and assert that if, and to the extent that, any of the provisions of Section 4 of the Bituminous Coal Act of 1937 relate or apply, or purport to relate or apply, to said coal produced at said mines, or any thereof, or to said transactions in said coal, said provisions of said Act are unconstitutional, void, and of no effect, in that said provisions of Section 4 of said Act are (i) violative and in contravention of the commerce clause of the Constitution of the United States, to wit: Article One, Section 8, Clause 3 thereof, and (ii) violative and in contravention of the due process clause of the Constitution of the United States, to wit: the Fifth Amendment thereof.

Wherefore, Applicants pray that exemption from all the provisions of Section 4 of the Bituminous Coal Act of 1937 be granted by the Commission to Applicants, to said coal produced at each and every of said three mines and to said transactions and commerce in said coal, and that the Commission enter an order (i) that Applicants, the said coal so produced and the said transactions and commerce in said coal, are not subject to the provisions of Section 4 of said Act, (ii) authorizing and directing that

7 any and all assessments paid or other payments made by Applicants prior to the effective date of said order under or by virtue of any of the provisions of Section 4 of said Act, be refunded and repaid to Applicants, and (iii) for such other and further relief as to the Commission shall seem right and proper in the premises.

LEIGH R. POWELL, JR.,

HENRY W. ANDERSON,

As Receivers of Seaboard

Air Line Railway Company.

W. R. C. COCKE,

General Counsel for

Receivers of Seaboard Air Line Railway Company.

L. B. PLUMMER,

General Attorney for

Receivers of Seaboard Air Line Railway Company.

[Duly sworn to by Leigh R. Powell, Jr., jurat omitted in printing.]

9

NATIONAL BITUMINOUS COAL COMMISSION

WASHINGTON, D. C.

Docket No. 49-FD

In the Matter of the APPLICATION OF RECEIVERS, SEABOARD AIR
LINE RAILWAY FOR EXEMPTION

Notice of hearing

Notice is hereby given that the Commission has assigned the above entitled case for hearing on the 30th day of August 1937, at ten (10) o'clock A. M., at a Hearing Room of the Commission, Carlton Hotel, Washington, D. C.

As provided in the Rules of Practice and Procedure before the Commission, the applicant shall at such hearing present evidence in support of the application, and all other interested persons may appear and be heard.

By order of the Commission.

Dated this 11th day of August 1937.

[SEAL]

F. W. McCULLOUGH, *Secretary*.

10

Before National Bituminous Coal Commission

Memorandum

SEPTEMBER 14, 1937.

To: F. W. McCullough, Secretary.

From: C. F. Hosford, Jr., Chairman.

Subject: Change of order of assignment, Docket No. 49-FD, Seaboard Airline Railway Company.

Please take note that subject application will be heard by Examiner Tilman D. Cantrell in place of Examiner Charles S. Mitchell.

(Sgd.) C. F. HOSFORD, JR.
C. F. Hosford, Jr.

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NATIONAL BITUMINOUS COAL COMMISSION

WASHINGTON, D. C.

[Title omitted.]

Docket No. 49-FD

Order of reference

Upon due consideration the above entitled matter is hereby—

1. () Reserved for consideration by the full Commission:

2. (X) Assigned and referred to:

(a) () A Board of ----- Commissioners.

(b) () A Commissioner.

(c) () A board of ----- employees.

(d) (X) An examiner.

for the purpose of—

1. () conducting an investigation and making a report to the Commission.

2. (X) conducting a hearing and submitting findings of fact and the recommendation of an appropriate order in the premises.

By order of the Commission.

Dated this 11th day of August 1937.

[SEAL] (Sgd.) F. WITCHER McCULLOUGH,
F. Witcher McCullough,

Secretary.

12 Before National Bituminous Coal Commission

CITY OF WASHINGTON,

District of Columbia, ss:

Affidavit of proof of service

Sherman E. Burt, Assistant to the Secretary of the National Bituminous Coal Commission, being first duly sworn, on his oath deposes and says: That he served upon Receivers, Seaboard Air Line Railway Company, the Consumer's Counsel, District Board No. 8, and the Commissioner of Internal Revenue a true and correct copy of Notice of Hearing, Docket No. 49-FD, a true and correct copy of which is attached hereto and made a part hereof, by mailing it properly addressed with postage prepaid to the above named parties on the 11th day of August, 1937.

(Sgd.) SHERMAN E. BURT.

Subscribed in my presence, and sworn to before me this 14th day of August 1937.

[SEAL] (Sgd.) ANNA N. JOHNSON,
(Title) *Notary Public.*

My Commission expires August 6, 1938.

12-A [Notice of hearing omitted in printing.]

13 Before National Bituminous Coal Commission

CITY OF WASHINGTON,

District of Columbia, ss:

Affidavit of proof of service

Sherman E. Burt, Assistant to the Secretary of the National Bituminous Coal Commission, being first duly sworn, on his oath

deposes and says: That he served upon Receivers, Seaboard Air Line Railway Company, the Consumers' Counsel, District Board No. 8, and the Commissioner of Internal Revenue a true and correct copy of Notice of Adjourned Hearing, Docket No. 49-FD, a true and correct copy of which is attached hereto and made a part hereof, by mailing it properly addressed with postage prepaid to the above named parties on the 3rd day of September 1937.

(Sgd.) SHERMAN E. BURT.

Subscribed in my presence, and sworn to before me this 8th day of September 1937.

[SEAL]

(Sgd.) ELEANOR L. HALEY,
(Title) *Notary Public.*

My Commission expires.

14 [Notice of hearing omitted in printing.]

15 Before National Bituminous Coal Commission

CITY OF WASHINGTON,

District of Columbia, ss:

Affidavit of proof of publication

Eugene J. Earley, Administrative Assistant of the National Bituminous Coal Commission, being first duly sworn, on his oath deposes and says: That he sent by letter on the 12th day of August 1937, to the Ashland Independent, Ashland, Kentucky, for publication, a true and correct copy of Docket No. 49-FD, Notice of Hearing, "In the matter of the application of Receivers, Seaboard Air Line Railway Company for exemption" a true and correct copy of which is attached hereto and made a part hereof.

(Sgd.) EUGENE J. EARLEY

Subscribed in my presence, and sworn to before me this 13th day of August 1937.

[SEAL]

(Sgd.) ANNA N. JOHNSON,
(Title) *Notary Public.*

My Commission expires August 6, 1938.

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AUGUST 12, 1937

ASHLAND INDEPENDENT, *Ashland, Kentucky.*

GENTLEMEN: This is your authorization to publish on one day Docket No. 49-FD, Notice for Hearing, copy of which is attached.

Please note government regulation provides that the advertisement must be set solid without paragraphs.

Very truly yours,

NATIONAL BITUMINOUS COAL COMMISSION.
By F. W. McCULLOUGH, *Secretary*.

Enclosure:

EJE/as.

CC Mr. Hand.

17 [Notice of hearing omitted in printing.]

18 *Affidavit of publication*

ASHLAND DAILY INDEPENDENT
ASHLAND PUBLISHING CO., INC.
Ashland, Kentucky

STATE OF KENTUCKY.

County of Boyd, ss:

Before me a Notary Public in and for the state and county aforesaid, came the undersigned B. F. Forgey, who states that he is president of the Ashland Publishing Company, publishers of the Ashland Daily Independent, the paper designated as the official organ for all legal publications in the city of Ashland, Kentucky, and that there was published the attached Notice of Hearing—Department of the Interior, National Bituminous Coal Commission—Docket 49-FD and Docket 31-FD, in the Ashland Daily Independent on August 14, 1937.

(Sgd.) B. F. FORGEY,

President, Ashland Publishing Co.

Subscribed and sworn to before me this the 24th day of September 1937.

(Sgd.) ETHEL WAMSLEY,

Notary Public, Boyd County, Kentucky.

My Commission expires February 13, 1940.

19 [Notice of hearing omitted in printing.]

20 Before National Bituminous Coal Commission

*Petition of Legh R. Powell, Jr., and Henry W. Anderson, as
Receivers of Seaboard Air Line Railway Company, for con-
tinuance of the hearing set for August 30, 1937*

Aug. 18, 1937

The undersigned, Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air

Line Railway Company, hereinafter called "Applicants," respectfully show to this honorable Commission:

That pursuant to the provisions of Section 4-A of the Bituminous Coal Act of 1937 Applicants filed with the Honorable The National Bituminous Coal Commission, on the fourth day of August 1937, their verified petition for exemption from the provisions of Section 4 of said Bituminous Coal Act of 1937.

That by its Order No. 49-FD, dated the 11th day of August 1937, the Commission notified Applicants that hearing upon their petition for such exemption would be held on the 30th day of August 1937, at ten o'clock A. M., at a hearing room of the Commission, Carlton Hotel, Washington, D. C.

That the said order was received by Applicants on the 12th day of August 1937.

That the time between the receipt by Applicants of said Order No. 49-FD and August 30 1937, the date fixed therein for the hearing upon Applicants' said petition for exemption, is not sufficient to enable Applicants and or their counsel to collect
21 the documentary evidence and arrange for the oral evidence it will be necessary for Applicants to present at said hearing in support of their said petition, and which evidence Applicants are informed and believe the Commission will require be full, complete, and in detail.

Applicants state that the railroads in their possession and control and being operated by them are extensive and that the operation thereof requires a large staff of officers and other employees; that at this season of the year many of their officers and other employees are on vacation, and their official and clerical forces are now, and will for not less than thirty more days, be materially depleted thereby; that among their officials now absent on vacation is their General Counsel, Mr. W. R. C. Cocke, whom Applicants will desire to participate in the presentation of Applicants' case at said hearing and who will not be available until after the date set by the Commission for said hearing. Applicants further state they are advised that the executive officer of one of the corporations from which Applicants acquired title to certain of the coal involved in Applicants' said petition for exemption had, prior to the issuance of the Commission's said Order No. 49-FD, departed on an extended vacation and will not return or be available to your Applicants as a witness until the middle of September 1937, or later. Applicants also state that their inability to have these parties present at said hearing may prejudicially affect Applicants and the receivership estate of Seaboard Air Line Railway Company which is being administered by Applicants under the control and direction

22 of the District Court of the United States for the Eastern District of Virginia.

Applicants further state that a number of the parties connected with the transactions of Applicants at the respective mines referred to in Applicants' petition for exemption are scattered, reside at distant points and that more time will be required in arranging for their attendance as witnesses for Applicants at said hearing than is available between the date of said Order No. 49-FD and the date now set for said hearing.

Applicants are advised it is the desire of counsel, who will represent Applicants at said hearing to confer in advance with counsel for the Commission and if possible agree with counsel for the Commission upon the stipulation of certain material and relevant facts and thereby conserve the time of this honorable Commission. Such conference or conferences will require counsel for Applicants to go to Washington, D. C., and will consume further time.

Wherefore, Applicants pray that the Commission enter its order continuing and postponing the hearing upon Applicants' said petition for exemption, for a period of not less than thirty days from and after August 30, 1937, and for such other and further relief as to the Commission shall seem right
23 and proper in the premises.

LEGH R. POWELL, JR.,
HENRY W. ANDERSON,
*As Receivers of Seaboard
Air Line Railway Company.*

L. B. PLUMMER,
*General Attorney for Receivers of Seaboard Air Line
Railway Company.*

[*Duly sworn to by Legh R. Powell, Jr.; jurat omitted in printing.*]

24 NATIONAL BITUMINOUS COAL COMMISSION
WASHINGTON

Memorandum granting continuance

AUGUST 20, 1937.

To: Mr. A. G. Price, Chief of Docket Section.

From: E. C. Faris.

Subject: Application of receivers of Seaboard Air Line Railroad for continuance of hearing, Docket 49-FD.

The application for continuance of the Seaboard Air Line Railroad has been granted and the hearing will be on September

15 in the Patio Room of the Carlton Hotel. This will serve as notice of continuance.

(Sgd.) E. C. FARIS, JR.,
Clerk of Hearings.

25 BEFORE NATIONAL BITUMINOUS COAL COMMISSION

UNITED STATES DEPARTMENT OF THE INTERIOR

Docket Number 49-FD

In the Matter of Application of RECEIVERS OF SEABOARD AIR LINE
RAILWAY FOR EXEMPTION

*Petition of Bituminous Coal Producers Board for District 8
for leave to intervene*

The petitioner, Bituminous Coal Producers Board for District 8, by its attorney, respectfully requests the National Bituminous Coal Commission to enter its order in the above-entitled matter allowing the petitioner to intervene in such matter and assigns in support thereof the following reasons:

(1) The petitioner is the district board of code members organized pursuant to the provisions of subsection (a) of Part I of Section 4 of the Bituminous Coal Act of 1937 (Public, Number 48, 75th Cong., 1st sess.) for District 8 as such district is described in the Annex to said Act, with address at Transportation Building, Cincinnati, Ohio.

26 (2) The application of Receivers of Seaboard Air Line, hereinafter referred to as applicants, for exemption from the code, filed in this matter, shows that the mines involved herein are located in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, and are, therefore, included within the territory comprising said District 8 as described in the said Annex to the said Act.

(3) The application of the applicants further indicates that, if said application be granted, all commerce in all coal produced at said mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, will be exempted from the provisions of Section 4 of the said Act.

(4) The petitioner is informed and believes that, beginning with the third day following the filing of the application herein, all commerce in all coal produced by the applicants at the said mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, has been exempted from the provisions of Section 4 of said Act and

shall so remain exempted until such time as the Commission shall act upon the application, pursuant to the provisions of the second paragraph of Section 4-A of said Act.

(5) The petitioner has imposed upon it by the terms of said Act important and extraordinary duties in respect of the execution of the provisions of Section 4 thereof which require that at all times it be capable of ascertainment of both the commerce in coal and the producers thereof which are subject to the provisions of said Section 4 as far as they relate to District 8 and otherwise.

The petitioner further prays, in the event that its petition for intervention in the above-entitled cause should be granted by the Commission as set forth hereinabove, that the National Bituminous Coal Commission enter its order denying the application of the applicants in so far as it relates to commerce in coal produced at the said mines located in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, and assigns in support thereof the following reasons:

(1) The petitioner is advised and believes that certain coal produced at the said mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, is not coal consumed by the producer or coal transported by the producer to himself for consumption by him.

(2) The petitioner is advised and believes that the commerce in certain coal produced at the mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, is such commerce in coal as described and covered by the third paragraph of Section 4 of said Act as "interstate commerce" and, therefore, subject to the application of all of the provisions of said Section 4.

The petitioner further prays for such other relief as the National Bituminous Coal Commission may deem necessary and proper.

BITUMINOUS COAL PRODUCERS BOARD FOR DISTRICT 8.

By ———, *Attorney.*

83½ Transportation Building, Washington, D. C.

30(15) BEFORE THE NATIONAL BITUMINOUS COAL
COMMISSION

Wednesday, September 22, 1937

A hearing on petition for exemption under Sections 4 and 4(a) of the National Bituminous Coal Act, by the Receivers of the Seaboard Airline Railway Company, (Docket 49-FD) was held

at 10:10 o'clock a. m., Wednesday, September 22, 1937, in the Rose Room of the Washington Hotel, Washington, D. C.

Examiner, **TILMAN D. CASTRELL**.

Present for the Commission: Legal Division: Leo W. Harrington, Carl D. Speed. Marketing Division: E. S. Meany. Consumers' Counsel: W'm. S. Eichelberger.

Appearances

W. R. Cocke, Counsel for the Applicant. L. B. Plummer, general attorney for the Applicant. W. H. Delaney, Attorney for the Applicant. B. T. Ansell, counsel for District Board No. 8, in opposition to the application.

30(2)

Colloquy

The EXAMINER. Gentlemen we are waiting just a few minutes for Mr. Eden. I am advised he will be here in just a second. In the meantime while we are waiting for Mr. Eden will you give your appearances to the reporter?

Mr. PLUMMER. We have already done so.

Mr. HARRINGTON. Yes.

The EXAMINER. I think we will go on without Mr. Eden.

I would like for you to make an opening statement if you will, please, so that we can better follow the introduction of evidence here.

Mr. COCKE. Mr. Plummer will make it.

Mr. PLUMMER. Mr. Examiner, this is a proceeding on the application of Leigh R. Powell and Henry W. Anderson as receivers of the Seaboard Air Line Railway Company, filed under the provisions of Section 4 (a) of the Bituminous Coal Act of 1937, for exemption from the provisions of Section 4 of that Act.

As set forth in the receivers' application exemption is claimed by them by virtue of the provisions of Section 4 (1) of the Act, which Section reads as follows: "The provisions of this section shall not apply to the coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

30(3)

The position of the Receivers is that they are producers of the coal at each of these three mines within the purpose and intent of this section 4 (1) of the Act; that the coal produced at each of those mines is the Receiver's own coal. It is coal which is transported by them for themselves; for consumption or use by them, and coal which is actually consumed or used by them in the operation of railroads in their possession and control and is hence, coal exempted by the provisions of Section

4 (1) of the act: expressly exempted from the provisions of Section 4 of the Act.

The EXAMINER. Mr. Reporter, I do not believe it will be necessary to take down the opening statement if you please.

(Whereupon the balance of the opening statement was made off the record.)

The EXAMINER. Are there any other interested parties other than the applicant here this morning?

Mr. ANSELL. Mr. Examiner my name is B. T. Ansell, counsel for District Board No. 8, a board of producers organized under Section 4 of the Act, with authority given under the Act over District No. 8, as described in the Annex to the Act.

It appears from the application filed in this matter that 30(4) there is production and commerce of coal involved and produced from mines within the territory of District No. 8. The District Board perceives it is interested in this matter by reason of the duty imposed upon the Board under the Act and wishes to file this petition for leave to intervene. The petition also includes a prayer that the applicant's application in this matter be denied. For the reason, first, that the applicants are not entitled to exemption under either paragraphs of Section 4, whereunder they claim.

Therefore, we ask that the Examiner receive the petition on behalf of the intervenor which has been drawn in accordance with the Rules and Regulations of practice before the Commission, copy of which has been served upon the applicants.

The EXAMINER. Mr. Ansell, do you want a copy of this petition to be made also as part of the record as Mr. Plummer requested of the application itself?

Mr. ANSELL. I do.

The EXAMINER. The petition of the Intervenor will be accepted.

[Petition of Applicant omitted. Printed side page. 1 ante.]

30(14) [Petition of the intervenor omitted. Printed side page. 25 ante.]

30(19)

CONTINUATION OF PROCEEDINGS

Mr. HARRINGTON. Have you an extra copy of that petition for the Legal Department?

Mr. ANSELL. And filed the requisite number of copies?

Mr. PLUMMER. Mr. Examiner I would like to ask if the application of the Receivers for exemption is being made part of the record?

The EXAMINER. Yes. The application of the Receivers for exemption is being made part of the record. Yes, sir.

Are you ready to proceed now gentlemen?

MR. PLUMMER. Yes; we are ready to proceed. We will call our first witness.

The EXAMINER. Have you more than one witness?

MR. PLUMMER. Yes.

The EXAMINER. Let us swear all of the witnesses at the same time.

MR. PLUMMER. We will swear three, if that suits you, initially, and then if we decide to put on more you can swear them.

The EXAMINER. As you please.

(Whereupon three prospective witnesses for the Applicant were produced and duly sworn.)

FRANK R. BRITTAIN was produced for and on behalf of the applicant and having been previously duly sworn, was examined and testified as follows:

Direct examination by MR. PLUMMER:

Q. Will you state your name and residence and in what capacity you are employed by the Receivers of the Seaboard Air Line Railway Company; and if so employed, how long have you been so employed; and whether you are of age?

A. Frank R. Brittain, Portsmouth, Virginia. I am and have been since previous to 1934 continuously employed as Contract Clerk and Custodian of Records for the Receivers of the Seaboard Air Line Railway Company. I am over twenty-one years of age.

Q. Are you employed, Mr. Brittain; are you not, as custodian of contracts?

A. Yes, sir; contracts.

Q. Of what do your duties consist?

A. I examine, record, index, and file as part of the contract records of the Receivers contracts of the Receivers. I also make and distribute to the departments interested abstracts of such contracts.

Q. Have you as such custodian received for filing, abstracting, and recording the respective instruments of to the Receivers of the coal in what is known as the Glamorgan mine; in what is known as the William-Ann Mine in Mingo County, West Virginia and what is known as the Chilton Block, No. 1 mine in Logan County, West Virginia?

A. I have.

Q. Have you as such custodian received for filing, abstracting, and recorded the contracts between the Receivers and the respec-

tive individuals or corporations who have in the past and are now performing for the receivers the work and service of extracting, mining, and loading for the Receivers the coals produced in each of these three mines?

A. I have.

Q. Are you familiar with these instruments of conveyance of the coal to the Receivers and with the contracts that those individuals or corporations who have performed and are now performing this work and service for these Receivers at these three mines?

A. I am.

Q. I hand you the following set of papers marked "Comptrollers Contract No. 23781-A." Please examine these papers and identify them and state what those papers cover.

Mr. COCKE. We propose to ask that these original documents be received but that we be permitted to substitute copies because these are the originals for the Receivers' files.

30(22) The EXAMINER. That request will be granted and you will of course substitute certified copies?

Mr. COCKE. Yes.

The EXAMINER. That will be all right.

Mr. PLUMMER. I think it will save time if we have this witness identify them, naming the contracts in each case.

The EXAMINER. Do I understand that each contract is already identified?

Mr. PLUMMER. It will be identified by the witness himself.

The EXAMINER. By the witness himself?

Mr. PLUMMER. Yes.

The EXAMINER. I don't object to that. That is all right.

Mr. PLUMMER. I will withdraw that question and put it this way if I may.

By Mr. PLUMMER:

Q. Do you identify this set of instruments to be the instruments of conveyance to the Receivers of the coal in the Glamorgan Mine? Mr. Brittain, I am asking you another question. Do you identify these instruments as being the instruments of conveyance to the Receivers of the coal in the Glamorgan Mine?

A. I do.

30(23) The EXAMINER. Do you feel very strongly about not having the exhibits identified by the reporter?

Mr. PLUMMER. No. I am asking that the reporter may identify this as Exhibit No. 1, for the Applicant.

(Whereupon Comptroller's Contract No. 23781-A was marked "Applicant's Exhibit No. 1" for Identification.)

Mr. COCKE. I ask that we be permitted to substitute copies in place of the originals of these documents.

The EXAMINER. Yes.

By Mr. PLUMMER.

Q. I show you this paper marked "Comptroller's Contract"—a set of papers marked "Comptroller's Contract No. 23782-A." Do you identify these papers to be the instruments of conveyance to the Receivers of the coal in the William-Ann Mine?

A. I do.

(Whereupon Comptroller's Contract No. 23782-A was marked "Applicant's Exhibit No. 2" for Identification.)

Q. I hand you a set of papers marked "Comptroller's Contract marked 24363-A." Do you identify those papers as being the instruments of conveyance to the Receivers of the coal in the Chilton Block No. 1 Mine?

A. I do.

30(24) Mr. PLUMMER. I ask the reporter to identify this as Exhibit 3.

(Whereupon Comptroller's Contract No. 24363-A was marked "Applicant's Exhibit No. 3" for Identification.)

Q. I hand you a set of papers marked "Comptroller's Contract No. 23781-B." I ask that it be identified as Exhibit 4. Do you identify these papers to be the contracts providing for the performance for the Receivers of the work and services of extracting, mining, and loading coal for the Receivers at the Glamorgan Mine?

A. I do.

(Whereupon Comptroller's Contract No. 23781-B was marked "Applicant's Exhibit No. 4" for Identification.)

Q. I hand you a set of papers marked "Comptroller's Contract 23782-B," which I request be identified as Exhibit 5. Do you identify these papers to be contracts providing for the performance for the Receivers of the work and services of extracting, mining, and loading coal for the Receivers at the William-Ann Mine?

A. I do.

(Whereupon Comptroller's Contract No. 23782-B was marked "Applicant's Exhibit No. 5" for Identification.)

Mr. PLUMMER. I request the reporter to mark this as Exhibit No. 5.

By Mr. PLUMMER:

30(25) Q. I hand you a set of papers marked "Comptroller's Contract 24363-B," which I request to be identified and marked as "Exhibit 6." Do you identify these papers to

be the contracts providing for the performance for the Receivers of the work and service of extracting, mining, and loading coal for the Receivers at the Chilton Block No. 1 Mine?

A. I do.

(Whereupon Comptroller's Contract No. 24363-B was marked "Applicant's Exhibit No. 6" for Identification.)

Mr. PLUMMER. Mr. Examiner, we find there is one instrument which constitutes part of this Comptroller's Contract 23782-A offered as Exhibit No. 1, which we omitted to hand to the witness and we ask permission to add that and offer it to be added as part of that same exhibit.

The EXAMINER. Yes.

Mr. COCKE. I understand that is an instrument which has only been recently executed and we would like to have leave to supply additional copies of that instrument as soon as we can have it copied.

Mr. PLUMMER. We have no copy.

The EXAMINER. I see that it is not a long instrument. I imagine it can be done during the course of this hearing. It is only two or three pages long.

By Mr. PLUMMER:

30(26) Q. I will ask the witness to identify these instruments as part of such instrument of conveyance in which the Receivers acquired title to the coal at the William-Ann Mine. Do you identify that contract as being a part of it?

A. I do.

(Whereupon the said papers were marked "Applicant's Exhibit 1 (a)" for Identification.)

The EXAMINER. As I understand it, the first instrument with reference to this particular contract with this mine was identified as Exhibit No. 1?

Mr. HARRINGTON. Mr. Examiner; do I understand now that those instruments are being offered here for identification only?

The EXAMINER. They are being offered for identification only at this time. They are not offered in evidence yet.

Mr. PLUMMER. Mr. Examiner, I ask that the original—these original conveyances and contracts which Mr. Britain has just identified be received in evidence and that we be permitted to withdraw them and substitute copies of them, certified by the witness as such custodian of the records.

We also ask that those copies as so certified be identified by the Exhibit Numbers in the place of the originals, 1 to 6, and 1 (a).

Mr. HARRINGTON. Mr. Examiner. I wish at this 20(27) time to enter an objection to the admission of these documents as evidence in this case.

The EXAMINER. The documents offered by the Applicant and introduced as Exhibits 1 to 6, inclusive and 1 (a), will be accepted in evidence subject to the objection; with the right of the applicant to furnish certified copies of each of the said exhibits.

Mr. COCKE. May we ask what the grounds of the objection to the introduction of these documents is?

Mr. HARRINGTON. Well, the grounds are that first, we have not had an opportunity of reading over those documents and therefore we might have some objection that we could offer at this time. But we now submit and make a general objection for the reason that we want to read the instruments over and then later, if we find there is some material here we wish to object to we can save ourselves by this general objection.

Mr. ANSELL. I have had no opportunity to examine any of the documents offered for identification and now offered for admission into evidence. I have no objection to their going in provided they are going in subject to a motion to strike them out, which I may make after I have had an opportunity to examine them.

The EXAMINER. Mr. Ansell, these exhibits, as you 30(28) see, are rather lengthy. I do not believe any of you gentlemen would have an opportunity to make a real study of the exhibits at this time without a considerable delay of the hearing.

Mr. ANSELL. As I stated, Mr. Examiner, I have no objection provided that the record show I reserve the right to move to strike them out and ask that the Examiner consider that motion.

The EXAMINER. Let the record show that reservation. It will be considered at the time of the finding of facts, or recommendations.

Mr. COCKE. May I make an additional observation, Mr. Examiner?

The EXAMINER. Yes.

Mr. COCKE. I cannot imagine that it would be proper on any legal grounds that I can conceive of, to admit any of these documents subject to any motions to strike from the record. These documents are offered in evidence in support of the Application made by the Receivers for exemption. Whether these documents bear out the claim for exemption, of course is the question which is directly in issue before you now. But certainly to show what the situation is and what the relationships of the Receivers are

to these three mining operations, it is inconceivable that
 30(29) these documents are not relevant to prove those facts. We
 therefore insist, in order that the record may be clear,
 that these documents are plainly admissible in evidence and not
 conceivably subject to any motion to strike.

Mr. ANSELL. I think, as a party to these proceedings, I am
 certainly entitled to examine those documents before they be ad-
 mitted into evidence. I am very much surprised that the gentle-
 man takes the position that he does.

The EXAMINER. Mr. Ansell, as I understand Mr. Cocke, the
 exhibits offered here are mainly for the purpose of showing
 the relationship between the Receivers and—are they coal com-
 panies or separate corporations from the Receivers?

Mr. PLUMMER. As to these Seaboard Receivers? In the sense
 of any stock ownership?

The EXAMINER. The three mines that you referred to here are
 corporations separate and apart from the Receivers?

Mr. PLUMMER. Yes; these landlords are entirely separate and
 apart from the Receivers. The Receivers have no stock.

The EXAMINER. The purpose of the introduction of these ex-
 hibits is to show the relationship between the Receivers and the
 corporation or other individuals involved.

30(30) Mr. COCKE. The contractual relationship.

Mr. PLUMMER. The purpose is to show the nature of
 the transaction; the terms and provisions of the contract, which
 are in effect.

The EXAMINER. I understand that the objections of the Legal
 Division and the Intervenor to be merely this: That they have
 not had an opportunity to read the exhibits at this time, nor
 have I—and that they are merely reserving their rights, as you
 gentlemen would do, to object if they find out at some subsequent
 time when they have had time to study the exhibits, that they
 are improperly accepted into evidence. So they are accepted
 subject to the objections made.

(Whereupon the documents referred to were marked in evi-
 dence.)

By Mr. PLUMMER:

Q. You have with you, have you not, copies certified by you,
 of the original documents which have been identified and offered
 in evidence?

A. I have.

Q. Is each copy a true and correct copy of the original and
 has attached thereto your certificate to that effect?

A. Yes, sir.

Mr. PLUMMER. Mr. Examiner, these are the copies which I hand to the Reporter to substitute for the originals.

30(31) Mr. COCKE. Mr. Examiner, I dislike to spend any more time on preliminaries than is absolutely necessary but in view of the objections made by counsel I would like to have this situation made entirely clear.

We have witnesses here who are capable of identifying the actual execution of those original documents, as having been properly executed for what they may be worth legally.

Does the objection go, Mr. Ansell, to any question of the execution of the instruments or merely to their admissibility? That is, do you make any question as to the execution of them?

Mr. HARRINGTON. We make no question of the legality of the instruments themselves.

Mr. COCKE. I see. All right.

The EXAMINER. That is true of the Intervenor, too?

Mr. ANSELL. Well, it may be. Of course, never having had any occasion whatsoever to know what they are, outside of the statement of counsel, I do not know what my objection to them may be. I object simply because I did not have an opportunity to examine them.

The EXAMINER. Well, Mr. Ansell, I do not understand. What Mr. Cocke says—you are not objecting to the introduction and identification of these documents whatever they might
30(32) contain, and identification of them as documents or as contracts of the applicant company here. In other words, Mr. Ansell, you are not requiring a more strict identification of the documents? Are you not objecting to the way they were offered or introduced in evidence?

Mr. ANSELL. Well, as I recall, first they were offered for identification as contracts that were entered into by certain predecessors of the Seaboard Air Line Railway or Receivers. In view of counsel's statement, which I have no occasion to doubt, I would be perfectly willing to say they are those instruments.

Mr. COCKE. Mr. Ansell, here is the—what I may say, to illustrate—here are the formal drafts of the documents showing the signature of the Peerless Coal Corporation by W. C. Shunk, its president, and then the signature of the witness, and then the signature of Legh Powell and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company; also witnesses to the execution and the signature of the Receivers.

Now, my question is whether or not your broad reservation of the right to object to these instruments would, by any possibility, include any challenge as to the proper, formal execution of the instruments themselves.

Mr. ANSELL. Mr. Examiner, I will concede, as far as 30(33) District Board 8 is concerned, that these documents are what they purport to be and as described by the witness and by counsel.

The EXAMINER. Will you proceed then, Mr. Plummer?

Mr. PLUMMER. I understand then, counsel is excepting to the genuineness of these instruments.

The EXAMINER. That is correct, the Examiner understands that.

Mr. PLUMMER. Here is one additional instrument, Mr. Examiner, which I desire to hand to the witness.

By Mr. PLUMMER:

Q. I hand you an instrument, being an agreement between the Receivers of the Sea Board Air Line Railway Company and the Peerless Coal Company, dated September 1, 1937, between the Receivers of the Seaboard Air Line Railway Company and the Peerless Coal Company and ask the witness if he identifies that contract as being one of the instruments under which the Receivers acquired title to the coal at the Glamorgan Mine?

A. I do.

Mr. PLUMMER. I ask that it be—

Mr. HARRINGTON (interposing). Cannot the witness identify them himself, without the attorney identifying it for him? I mean, the witness is familiar with these contracts and I think

he would be in a position to identify them by his own 30(34) statement rather than by a leading question of counsel.

By Mr. PLUMMER:

Q. I will ask the witness then, to state from his knowledge of the contract that it is such contract.

A. This is an agreement by the Peerless Coal Corporation to assume obligations and it agrees to perform the duties assumed by the Glamorgan Coals, Inc., under the contract already introduced, for mining and manufacturing coal.

Q. That is really a part of Exhibit 1, Mr. Examiner, and we would like to have it be admitted as an exhibit.

(Whereupon the papers referred to were marked "Applicant's Exhibit 1 (b)," in Evidence.)

Mr. PLUMMER. This is a part of Comptroller's Contract 23781-A which has been previously introduced.

Mr. HARRINGTON. Do you offer that in evidence?

The EXAMINER. Yes.

Mr. PLUMMER. Yes: I am offering that in evidence.

Mr. HARRINGTON. I wish to object to the introduction of this document in evidence for the same reasons stated in the objec-

tion to the other instruments introduced here. Exhibits from 1 to 6 and 1 (a).

Mr. PLUMMER. We understand, Mr. Examiner, that the objection of counsel to this is not directed to the genuineness of this instrument.

30(35) The EXAMINER. That is the understanding.

Mr. ANSELL. Mr. Examiner, I have an objection to make with the same reservation and the same objection with reference to the other exhibits offered, as to their genuineness.

Mr. PLUMMER. We have no further questions to submit to this witness.

The EXAMINER. Does the Legal Division have any further questions?

Cross-examination by Mr. HARRINGTON:

Q. Mr. Brittain, are you familiar with the contract, or deed, or lease, made on the 12th day of July 1934, wherein between the Glamorgan Coal Land Corporation and the Receivers are lessees in that instrument?

A. Yes, sir.

Mr. PLUMMER. May I interrupt? Is that one of the exhibits already introduced in evidence? Well, then, this witness was purely for the purpose of identification and we submit the instrument is the best evidence to state the contents.

The EXAMINER. Mr. Harrington, May I suggest—you have had no opportunity whatsoever to see what these exhibits are.

I will call a recess for fifteen minutes to give you an
30(36) opportunity to check over the exhibits in a general sort of way and to talk with Mr. Plummer and Mr. Cocke. And at that time if you have any further questions of this witness why then you may ask them.

(Whereupon a fifteen minute recess was had.)

Mr. COCKE. Mr. Examiner, in view of the natural desire of the other counsel to have some understanding as to what, not only what these documents which have been introduced in evidence contain but also what the purpose is and how they work, it has occurred to us that it might save time in the long run and be illuminating in this hearing if we were to place Mr. L. B. Plummer on the stand and have him sworn and explain those documents, subject, of course, to cross-examination.

Mr. Plummer has for years been intimately familiar with all the details, all of the details of these particular transactions. He has participated in all the negotiations for the making of those contracts. As a matter of fact he has himself been the draftsman of mostly all of them and I think it would be helpful not only to the Examiner but to the other counsel if he were

to take the stand and describe these instruments, their essential provisions and the manner in which they operate. And 30(37) if there is no objection to that, of course, we would like to have that done.

The EXAMINER. I think it would be helpful to the Examiner. Do the attorneys have any objection to the attorney Mr. Plummer explaining these exhibits offered in evidence?

Mr. HARRINGTON. I object; I would like to have it understood that some of the parties who signed these contracts be called and some of the officers and the Receivers of the different coal companies be placed on the stand and give us a chance to cross-examine in these contracts, besides the attorney.

Mr. COCKE. There is no officer of the Receivers but we have some witnesses here who are of the Receivers organization and will be glad to explain any question.

Mr. HARRINGTON. You have witnesses here or any of the officers of the coal companies that signed these contracts?

Mr. COCKE. Yes.

Mr. HARRINGTON. And you are going to call them as witnesses too?

Mr. COCKE. We will be glad to.

Mr. HARRINGTON. Then that will be all right to me if you put him on the stand.

The EXAMINER. You have the full right of cross-examination of Mr. Plummer who is now appearing as a witness for the purpose of explaining the exhibits.

30(38) Whereupon L. B. PLUMMER was called upon as a witness on behalf of the Applicant and, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

The EXAMINER. Let me make one further statement. I said, "For the sole purpose"; I don't want to try to limit the testimony you are seeking to adduce through Mr. Plummer.

Mr. COCKE. I understand that.

By Mr. COCKE:

Q. Your name is L. B. Plummer?

A. Yes.

Q. You hold the position with the Receivers of the Seaboard Air Line Railways Company as general attorney, do you not, Mr. Plummer?

A. Yes; I do.

Q. Mr. Plummer, for a number of years you have been in the Seaboard law department, the member of that organization which

has been most intimately familiar with the negotiations and the drafting of the instruments relating to these transactions which are now the subject of this hearing?

A. Yes, sir; the preparation of these contracts—

Q. (Interposing.) Talk a little louder, please.

30(39) A. The preparation of these contracts has been part of my duties and I have also participated in each of the negotiations which have resulted in the making of these contracts. I personally drafted each one of these contracts. And I think I am, of course, thoroughly familiar with the provisions of them.

Q. Now, when you—will you first, with reference to each of these three sets of documents describe in brief detail just what those documents are, without any argumentative conclusions, but merely stating briefly what the contents are and the way in which those contracts are designed to operate. And I would suggest, since the oldest of these transactions, going the farthest back, is that with the United Thacker Coal Company and begin with that and describe it and take up the others thereafter.

Mr. HARRINGTON. Pardon me. Will you describe that—identify that as exhibit what?

Mr. COCKE. That is Exhibit 2. But this is the oldest of the transactions and has more of a background.

Mr. HARRINGTON. Well, I would like to have them identified, too.

By Mr. COCKE:

Q. You go ahead in your own words.

A. In the point of time, an arrangement which has stood for some time and is still in force, that at the William-
30(40) is the oldest. And I think it would clarify the situation somewhat for me to give you a little of the historical summary of this particular arrangement and the other similar arrangements.

In 1934, the William-Ann Mine—the coal in the William-Ann Mine had been leased by the United Thacker Coal; prior to 1934 by the United Thacker Coal Company and the Cole and Crane Trustees. That lease was—I don't know whether it was to Mr.—it was to a corporation. And a default occurred in that lease and the lease was cancelled and the properties were recaptured, which had belonged to the lessee corporation when recaptured by the lessor companies, the landlords. And the mine had been shut down. Now, at that stage of the matter the Receivers entered into an arrangement with the owners of these coal-bearing lands and the then owners, through recapture, of the mining equipment.

Q. Who are those owners?

A. Those owners were the United Thacker Coal Company and the Cole and Crane Trustees.

By Mr. HARRINGTON:

Q. Are they the owners of the fee and of the plant?

A. They are the owners of the fee and of the plant. These negotiations resulted in an arrangement under which the Receivers of the Seaboard acquired directly by grant from the land-owners, the coal at this mine; the exclusive right 30(41) and privilege to extract, mine, and produce that coal or cause it to be extracted, mined, and produced for their account.

By Mr. COCKE:

Q. Let me interrupt you there Mr. Plummer to ask whether or not prior thereto or during any of these transactions which you have so far described or will hereafter described, whether at the present time there is any sort of stock ownership or other kind of relationship other than is shown by these documents introduced in evidence between the Receivers of the Seaboard Air Line Railway or the Seaboard Air Line Railway itself with either the United Thacker Coal Company or the Cole and Crane Trustees?

A. Absolutely none.

Mr. HARRINGTON. What is the name of that other company please?

Mr. COCKE. United Thacker Coal Company.

The WITNESS. United Thacker Coal Company.

Mr. COCKE. And the Cole and Crane Trustees.

The WITNESS. The trustees.

By Mr. COCKE:

Q. Now what is the distinction in respect to the ownership of the fee of these lands between the United Thacker Coal Company and the Cole and Crane Trustees, if you happen to know it?

A. Well, it is my understanding of that, Mr. Cocke, 30(42) that some of those lands included in this instrument of conveyance are owned separately by the United Thacker Coal Company and by the Cole and Crane Trustees. The purpose of this lease, this grant, is to convey to the receivers the entire property interest of both the grantors in this coal.

Q. All right now, will you proceed with your story?

The EXAMINER. May I ask one question to clarify my thought on this?

The WITNESS. Yes.

The EXAMINER. Does the United Thacker Coal Company own the top works and the mine equipment or is that owned by the United Thacker Coal Company and the Cole and Crane Trustees?

The WITNESS. I am not—

The EXAMINER (interposing). I rather understood that the mining equipment and the property itself; that is, the title of the works belonged to one company and possibly the fee of the coal to another company; is that correct?

The WITNESS. I am not prepared to say how that ownership is divided; if at all, it is between the two grantor companies, but indeed one. It is owned either solely by one or jointly by both. I don't know. But the Receivers—but neither the Receivers or the operator at this mine own the mining equipment.

30(43) Mr. COCKE. I think there will be witness to succeed, that will come after Mr. Plummer, some time in the course of the hearing, that can give you that information.

The EXAMINER. I don't know that that is at all important.

Mr. COCKE. If it is I think we can develop that information.

By the WITNESS:

A. (Continuing.) The Receivers of the Seaboard Air Line Railway Company acquired in the manner I have stated the ownership of the coal at this William-Ann Mine. They then negotiated an arrangement, a contractual arrangement, with Mr. Daniel H. Pritchard as an experienced operator, for the operation of this mine; extracting, mining, and loading of the coal on railroad cars at the mine for shipment to the Receivers.

Now, that arrangement, originally, it is my recollection, I am quite sure, the contract will indicate it, was for a period of one years with the privilege of renewal in the Receivers in both cases, for successive yearly periods. The duration of the grant and the duration of the contract with Mr. Pritchard, the operator, was co-extensive in time.

Now, at the expiration of that first year and within the time required by the contract provisions, the Receivers exercised their right of renewal. And these contracts have
30(44) since that time, since 1934, been each successively renewed by the Receivers. And by agreements which are filed now in this case between the Receivers on the one hand and the land owners and between, on the other hand, the Receivers and the operator. And these arrangements have hence been continued continuously in effect since 1934, and are now in effect and continue in effect until, under the existing agreement, until October 1, 1938, with the right in the Receivers to renew both the grant from the land owner and the contractual arrange-

ment with the operator for a further period of one year, at the Receiver's option.

Q. In other words, as I understand it, it is an option for renewal which runs from year to year?

A. Yes, sir. Although it was originally, Mr. Cocke, for a period following the first year term of the agreement, I believe it was in the original grant. But now, I might say this much, the right of renewal has been one which has been in contemplation by the parties when the original agreement was made. And the Receivers have simply renewed the agreement. Of course the renewals have been subject to changed in tonnage and some adjustment of the compensation to the contractor, you see, from time to time, where those—

Q. (Interposing.) Without attempting to state all the minute details of these instruments will you state briefly their 30(45) most prominent provisions, just by way of a short description?

A. Well, I would say that these contracts give—the agreements or the grant from the landowners to the Receivers give the Receivers the right to—the exclusive right to extract and mine this coal for their own use. Now the Receiver—the contractual arrangement with the contractor provides that the contractor shall extract mine and load a certain tonnage from each of these mines within a minimum and a maximum limits.

Now the Receivers pursuant to the contract provisions issue instructions each month to the operator indicating the amount of tonnage they will require for their next succeeding month. That is followed by weekly instructions. Thus, the amount of coal, of course which the Receivers desire to take and do take from those mines is dependent and fluctuates of course, with their business. Now then, the arrangement with the landowners is that the Receivers pay directly of course to the landowners or for their account a royalty, which they pay, and these contracts prove that, of course. These grants or conveyances provide, in line with the usual practice, for minimum royalties to be paid the landlord. These royalties, as I have stated, are paid by the Receivers directly to or for the account of the landowners.

30(46) Q. Does the contractor himself participate in any way directly or indirectly in the payment of these royalties to the landowner?

A. No. Those royalties are paid by the Receiver directly to the landowner for their account. In one of the cases royalties have been assigned by the landowner in the Glamorgan Companies to the Shenandoah Life Insurance Company. These roy-

alties have been assigned in one case by the landowners to the Shenandoah Life Insurance Company.

Q. You are not referring to the United Thacker Coal Company?

A. No. That is a different arrangement. You want me to confine this to the United Thacker Company?

Q. Yes.

A. Suppose we strike that out.

Q. Mr. Plummer, state briefly the basis on which the Receivers compensate the contractor for his services in extracting the coal from the property leased to the Receiver by the United Thacker Coal Company and the Cole and Crane Trustees.

A. The Receivers compensate the contractor on a flat sum-per-ton basis of coal produced at this mine.

Q. Who pays the expense of the mining of the coal?

A. Well, initially of course, that expense is paid by the operator. He secures reimbursement of it, of course, 30(47) when he is compensated by the Receivers.

By the EXAMINER:

Q. May I ask one question now? There is a matter of definition of terms there. I understand when you refer to the contractor you speak of the United Thacker Coal Company and the Cole and Crane Trustees?

A. No. They are the lessors and grantors of the coal.

Q. When you refer to the operator?

A. I am referring to Mr. Pritchard—

Mr. COCKE. (Interposing.) He is the contractor.

By the WITNESS:

A. (Continuing.) He is the contractor who is employed by the Receivers to extract, mine, and load this coal for the Receivers.

By the EXAMINER:

Q. Then the contractor and operator are one and the same; is that correct?

A. Yes, sir; yes, sir; one and the same.

Mr. COCKE. He physically operates the mines under a contract to do so, with the Receivers.

By Mr. COCKE:

Q. Now, Mr. Plummer, will you proceed to describe in the same general way, briefly, the type of instrument under which the Receivers have acquired the mining rights in these 30(48) other mines; and also, the manner in which the coal is extracted.

A. In the case of the Glamorgan Mine——

The EXAMINER. Would you please identify that then as Exhibit No. 1; is that correct?

The WITNESS. Exhibit No. 1. Yes.

By Mr. COCKE:

Q. Exhibit No. 1.

A. In the case of the Glamorgan Mine the Receivers have acquired by grant or conveyance—and conveyance—from the Glamorgan Coal Land Corporation, the owner of the fee in the land, the title to the coal produced at that mine. And it has the sole and exclusive right to extract, mine and load and ship, of course for the Receivers own account, the coal produced at that mine. The Receivers of the Seaboard Air Line Railway Company; the corporation, have absolutely no interest in the form of stock ownership or otherwise in the Glamorgan Coal Land Corporation. It is an entirely separate and independent company.

Q. In other words the relationship—and this might savor of a conclusion and if you object I will withdraw the question—between the Receivers and the owners of the Glamorgan Mine are purely arms length transactions?

A. Absolutely.

Q. With no interest of the Receivers in the owner 30(49) corporation?

A. Entirely so. Now, at the Glamorgan Mine the Receivers, in this contract with this—at the time they acquired title to the coal in that mine they entered into a contractual arrangement with Glamorgan Coals, Inc. Now, Glamorgan Coals, Inc., had acquired in a foreclosure sale all the properties of the Stone Gap Colliery Company, which formerly owned the mining equipment at this mine; and the title to that mining equipment. The Receivers acquired title to this coal from the Glamorgan Coal Land Corporation and concurrently they entered into a contractual relationship—arrangement—with Glamorgan Coals, Inc., which is identically similar in principle and effect with the arrangement that we have with Mr. Pritchard at the William-Ann Mine, under which Glamorgan Coals, Inc., performed, and up to the time of the appointment of the Receivers, which occurred on January 16, 1937, for its properties, performed the work and service of extracting, mining, and loading at the mine this coal and shipping the coal for account of the Receivers to the Receivers for consumption and use by the Receivers.

Now, that concludes the arrangement in the Glamorgan case.

Q. Now, what happened at the Glamorgan? You men-

tioned the fact that the Receivers were appointed for its 30(50) properties. Now, what was the subsequent course of events with respect to that particular operation?

A. The Receivers were appointed. First it was—there was only one Receiver, Mr. A. E. Stone was appointed Receiver of the properties and assets of Glamorgan Coals, Inc., by decree of the Wise County, Virginia, Superior Court on January 16, 1937. An order appointing Mr. Stone Receiver directed that he continue to carry on the business of Glamorgan Coals, Inc., and Mr. Stone as Receiver, continued the performance of the contract between the Glamorgan Coals, Inc., or Seaboard Receivers. Subsequently, I think, in February, was it, Mr. Shunk? Is he here?

MR. SHUNK. February 14th.

By the WITNESS:

A. (Continuing.) February 14th, Mr. Walter T. Shunk by decree of the Wise County, Virginia, Circuit Court, was appointed coal receiver of the properties of the Glamorgan Coals, Inc. The coal receivers continue to carry out and perform the contract between the Glamorgan Coals, Inc., and its Receivers. Relative to wage increases and increases in the price of materials and so forth, some modifications of course, were made in the terms of the agreement—some increase allowed 30(51) in the compensation allowed to the operator and the Receivers of the Glamorgan Coal Co., Inc., was increased. Now, what is the date of that decree we had there? April?

By Mr. COCKE:

Q. The exact date is not necessary. The approximate time is all right.

A. The decree was later entered in the Glamorgan Receivership Cause, to which was attached (and that has been introduced now in this case), to which is attached a statement marked Exhibit A, which sets forth all the terms and conditions of the contract in effect between the Glamorgan Coals, Inc., or its Receivers and the Receivers of the Seaboard Air Line Railways Company, as of April 22, 1937. The Court entered an order directing the Glamorgan Receivers to adopt that contract containing the terms and provisions set forth in that instrument, exhibit, attached to that decree and to carry out and perform it. The order was subsequently entered—

By Mr. COCKE:

Q. May I interrupt just one second, Mr. Plummer? You have named the exhibit number of the decree of the Glamorgan number four?

The EXAMINER. Number four?

The WITNESS. Number four? That is not number four. That is one; that is the decree, marked exhibit four?

20(52) Where I said February 14th a little while back it should be February 12th.

The EXAMINER. What year was that, 1936 or 1937?

The WITNESS. 1937.

By the WITNESS:

A. (Continuing.) After the entry of the order directing the Receivers of Glamorgan Coals, Inc., to adopt and continue to carry out and perform this contract, and order was entered directing the sale of the properties and assets of the Glamorgan Coals, Inc. That order provided that the right—or right, title, and interest of Glamorgan Coals, Inc., or its receivers, should be sold along with all the right, title, and interest of Glamorgan Coals, Inc., or its Receivers under the existing agreement with the Seaboard Receivers should be sold as part of the assets of Glamorgan Coals, Inc., subject to the assent of the Seaboard Receivers to the sale and transfer of the contract. Now, that condition was inserted in the order because the contract between the Receivers and Glamorgan Coals, Inc., provided that the rights of Glamorgan Coals, Inc., should not be transferred or assigned without the consent of the Seaboard Receivers. At the sale of all the right, title, and interest of Glamorgan Coals, Inc., and its receivers, under this contract, that property was
30(53) bought in—bid in—by Mr.—a representative of the—acting for the Peerless Coal Corporation.

By Mr. COCKE:

Q. Let me interrupt you to ask whether the Peerless Coal Corporation was one in which the Receivers of the Seaboard, or Seaboard Air Line Railway Company itself, had any interest by stock ownership or otherwise?

A. Absolutely none. It is an entirely separate and distinct and independent company, and the Seaboard or the Receivers have no interest in it whatever through stock ownership or otherwise.

By Mr. HARRINGTON:

Q. When was that court sale made?

A. Pardon me?

Q. The court sale?

A. That was August 23rd. Mr. Shunk, when was the sale made of the contract rights?

Mr. SHUNK. August 23rd.

By the WITNESS:

A. August 23rd.

Now, the sale of the properties and assets of the Glamorgan Coals, Inc., and its receivers, were duly confirmed by order of the Receivership Court, the Glamorgan Receivership Court.

By Mr. COCKE:

Q. That is, the Wise County?

30(54) A. Yes. The contract was then entered into between the Seaboard Receivers and the Peerless Coal Corporation under which the Receivers assented to the purchase by the Peerless Coal Corporation of all the right, title, and interest of the Glamorgan Coals, Inc., and its receivers under this contract with the Seaboard Receivers.

Q. That is the agreement marked for the purpose of identification 1 (b)? Exhibit 1 (b).

A. (Continuing.) And under that agreement Glamorgan Coals, Inc., agree to carry out and perform the obligations on the part of the operator to be carried out and performed under that agreement. And the terms containing the terms and conditions set forth on a statement attached to it, marked Exhibit A, which is identical to the same statement of terms and conditions as I have previously referred to as attached, as part of the decree in the Wise County Circuit Court, authorizing the, and directing the Glamorgan Receivers to adopt the contract and carry out and perform it and continue to carry out and perform it. That, Mr. Cocke, outlines that.

Q. Now will you proceed with the outline of the third operation?

A. In the case of the Chilton Block No. 1 Mine—

Q. (Interposing.) Which is described in the papers 30(55) marked "Three"—three, isn't it Exhibit No. 3?

A. Three.

The EXAMINER. That mine is known as the Chilton Block No. 1?

By the WITNESS:

A. Yes; that is what we call it and as it is described in these contracts and described in our petition for exemption. Now, in the case of the Chilton Block No. 1 Mine, the Receivers, under the same general plan acquired by assignment and transfer from the Chilton Block Coal Company the right to take the coal from the Chilton Block Mine; acquired the ownership of the coal and with the assent of the Dingess-Rum Coal Company, which is the owner of the fee of the land and who had previously leased the right to take the coal from this mine to the Chilton Block Coal

Company. At the time of this transaction, this arrangement was effected, the Chilton Block Mine had not been operated for some time. Now, the Receivers employed, under a contractual arrangement entirely similar to the one existing in the William-Ann Mine case, Mr. Daniel R. Pritchard, to extract, mine, and load the coal on railroad cars and ship it for the account of the Receivers to the Receivers, at this Chilton Block No. 1 mine.

Q. Mr. PLUMMER. Have the Receivers of the Seaboard or the Seaboard Air Line Railways Company itself, any owner 30(56) by stock, or otherwise, or any connection with Chilton Block Coal Company or the Dingess-Rum Company?

A. Absolutely none. They are both entirely separate legal entities and neither the Seaboard Receivers nor the Seaboard corporation has any interest in stock, share, ownership, or otherwise.

Q. Nor as far as you know, have any of the directors or officers of the Railway Company?

A. That is the same thing, as far as any interlocking directorates and it is true of all the other companies.

Q. In other words, there is no sort of intercorporate tie-up in any part of these transactions or operations which you have described?

A. No, sir.

Q. Go ahead.

A. Well now, that pretty generally—I have stated—I think I did—under the same general arrangement, that the Receivers employed Mr. Pritchard to perform the services at this mine. I might add, right there, that this Chilton Block arrangement was made originally in 1935 and it has since been continuously in effect, through extension and renewal agreements, effective with both the landowners and the operator at this mine.

Q. Now, have you any further statement to make in 30(57) connection with these transactions Mr. Plummer, before your testimony is closed, as to the history of these operations?

A. I just thought that the Examiner and counsel would be interested in—

Q. Talk a little bit louder please.

A. (Continuing.) It occurred to me that the Exam'n'r and these counsel would perhaps be interested in one other point of history connected with these transactions. These original—these original arrangements between the Receivers at the William-Ann Mine and at the Glamorgan Coal Mine were made at the time when the N. R. A. Code was in effect.

The Receivers, from their desire, of course, to indicate to the Code Authorities that they were not seeking in any way to do anything to evade the provisions of the N. R. A. Code, or otherwise, decided that before they would enter into these arrangements that they would submit this plan to the N. R. A. Code Authorities.

I accompanied Colonel Anderson, one of the Seaboard Receivers, to Washington prior to the time these contracts were entered into. We explained the plan fully to Mr. Donald Richberg, who at that time was general counsel for the N. R. A. Mr. Richberg indicated to us that there was no legal objection to it at all but before committing himself one way or the other he desired to consult the Bituminous Coal Authorities and the head of the division who was just about to 30(58) meet him in conference. So we gave him this memorandum and he conferred with the head of the N. R. A. Code Division.

Q. What was the memorandum? One describing the—

A. (Interposing.) Well, it's just an outline, exactly what I have stated, that is, the plan of this what we proposed.

And two days later we received a telegram from Mr. Richberg to the effect that they saw no legal objection to it at all.

I merely wish to add that the present arrangements in effect at each of these mines are identically the same in principle and in effect, with what were in effect at that time and put into effect with the approval of the N. R. A. Code authorities.

Mr. COCKE. That is all I have to ask. Are either you or Mr. Ansell to cross-examine?

Mr. HARRINGTON. Do you want to recess?

The EXAMINER. Is it twelve o'clock?

Mr. HARRINGTON. It is twelve o'clock.

The EXAMINER. Do you gentlemen have any preference as to how long we should recess? Do you prefer an hour or an hour and a half?

Mr. COCKE. I think an hour would be sufficient. I should like to complete this if we can, today.

Mr. HARRINGTON. I want to glance over these contracts and an hour and a half would suit us better.

30(59) The EXAMINER. In view of that we will recess for an hour and a half, until 1:30.

(Whereupon at 12:00 M. a recess was had until 1:30 o'clock p. m. in the above-entitled matter.)

30(60)

AFTERNOON SESSION

(The hearing was resumed at 1:30 o'clock p. m., at the expiration of the recess.)

Whereupon **L. B. PLUMMER**, the witness on the stand at the taking of the recess, resumed the stand and was further examined and testified as follows:

The **EXAMINER**. Mr. Cocke, you may proceed with the examination of the witness.

MR. COCKE. Mr. Examiner, I stated at the close of the morning session that I had completed my examination of Mr. Plummer, but there are a few other questions that have occurred to me. So I would like to proceed, if I may, with a brief further hearing.

The **EXAMINER**. All right, sir.

Direct examination (continued) by **MR. COCKE**:

Q. Mr. Plummer, the various documents which have been introduced in evidence numbered respectively as exhibits constitute all the contractual arrangements both with the lessor owners of the land and with the contractors employed by the receivers to remove this coal?

A. Yes. They constitute all of the existing documents 30(61) between the landowners and lessors on the one hand and the operators and receivers on the other.

Q. Are there any other agreements of any nature or understandings, oral or otherwise, bearing upon or in any manner supplementing these written documents which have been introduced in evidence?

A. None whatever.

Q. Then these written documents already introduced as exhibits in this hearing are the sole repositories of the agreements between the various parties in interest?

A. That is correct.

MR. COCKE. Mr. Examiner, the intervention filed by this coal-producing board for District No. 8 states in support of its claim that the petition or application of the receivers of the Seaboard Airline in this matter should be dismissed on the grounds, 1, that the petitioner is advised and believes that certain coal produced at the said mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, is not coal consumed by the producer or coal transported by the producer to himself for consumption by him; and, second, that the petitioner is advised and believes that the commerce in certain coal produced at the mines in Mingo County, West Virginia,

Logan County, West Virginia, and Wise County, Virginia, respectively, is such commerce in coal as is described and covered by the third paragraph of section 4 of said act as "interstate commerce," and is therefore subject to the application of all provisions of said section 4. Now, we wish to traverse both of those statements or conclusions; and I assume that it will not be necessary for us to file any written reply or rebuttal to that statement.

The EXAMINER. I assume that that is correct, and I will so rule at this time.

Mr. COCKE. Very well.

By Mr. COCKE:

Q. Now, Mr. Plummer, will you state briefly and so far as your own knowledge goes and your own understanding that may be supplemented by the additional testimony from the witnesses what disposition is made of the coal produced at these three mines, shipped by whom and to whom, and how that coal is used or disposed of; and also whether or not it is a fact, as set forth in this intervening petition, that some of this coal is sold by the receivers in the market instead of being consumed by themselves? Will you state briefly what the facts are as far as your knowledge goes?

A. So far as my knowledge of the facts goes, none of this coal produced at either of these mines, except small quantities commonly known as house coal, which is sold as a necessary incident to the mining operations to mine employees, is sold—

30(63) Q. You mean coal for their own houses?

A. Yes. For their domestic use—is sold by the receivers. It is all with that exception shipped from the mines to points on the lines of railroads owned by the Seaboard Airline Railroad Company and operated by the receivers and is used or consumed by the receivers in their operation of their railroads.

Q. You do know further, do you not, that there are outstanding positive and definite instructions issued by the receivers through their duly authorized officers that no coal produced at the mines shall be sold otherwise than for these small domestic purposes to the miners there at the mines?

A. Yes; I know positively that advice was given by me as general attorney to the various departments of the Seaboard that none of this coal except this so-called house coal should be sold or otherwise disposed of. My information is that clear and positive instructions were issued by the law department to that effect. It is further my understanding that none of this coal shipped to the receivers from this mine or shipped from the mines is being sold or otherwise disposed of, and that all of it is being consumed

and used by the lines in the operation of these railroads.
30(64) Q. Now, Mr. Plummer, in the past—I am not speaking of the present—but in the past were there any instances, isolated or otherwise, within your knowledge in which there had been sales of coal; and, if so, have any such occasional instances been entirely discontinued; and, if so, when?

A. It was brought to my knowledge, I think, in the early part of May, if I am not mistaken, that some of this coal, after its receipt on the railroads operated by the receivers had in some isolated cases and in some infrequent transactions been sold to industries located nearby and in order to meet their emergency requirements.

Q. In small or large quantities?

A. In small quantities. Just a car at a time, was my understanding. I further understand that pursuant to advice given by the law department, instructions were issued in May, according to my recollection, as soon as this knowledge was brought to our attention, that these sales to industries should be discontinued. I further understand that they have been discontinued.

Q. So far as you know, those instructions have been observed; at the present time?

A. So far as I know, those instructions have been strictly observed; and we have witnesses here to testify to that effect.

30(65) Mr. COCKE. I think that is all. The witness is ready for cross-examination.

Cross-examination by Mr. HARRINGTON:

Q. How long have you been attorney for the Seaboard Airline Railway Company?

A. I have been attorney for the Seaboard line continuously since 1912. I passed the bar examination in 1910, it is my recollection.

Q. Could you tell us where the Seaboard Airline purchased their coal from prior to the making of the contracts between the companies mentioned here?

A. I cannot tell you that of my own knowledge, because the purchase of coal, of course, is not within the province of the law department. But I can state that my information is that, of course, they purchased this coal from the ordinary coal producers. Who they were I don't know. I am not informed.

Q. Did they purchase coal from the Glamorgan Coal Company?

A. I can state positively that the Seaboard receivers never purchased any coal from the Glamorgan Coal Corporation.

Q. I am speaking of the railroad now.

A. I am speaking of the railroad. The Seaboard
30(66) Railroad Company or its receivers never purchased any coal from the Glamorgan Coal Corporation or the Glamorgan Coals—which one are you referring to?

Q. The Glamorgan Coal, the one which is in operation of the coal lands.

A. No; they did not.

Q. And at the time this contract was made you just went out and made it in 1934, and was that made for the purpose of evading or contravening any act of the N. R. A.?

A. Absolutely not. It was made as a business move or measure in an effort to secure the coal as cheaply as they could.

Q. The reason I asked that question is that you stated in your direct examination that you submitted these contracts to the director or the administrator of the N. R. A. Code for his approval.

A. Yes; that was done because it was the unanimous view of all the counsel for the receivers was that the receivers were entirely within their legal rights to make arrangements of this sort. However, the receivers, as I explained before, felt that in view of the then existence of the N. R. A. Bituminous Coal agreement, they should submit the matter to the Code authorities; and, if possible and proper, get their concurrence in the entire legality of these arrangements, which was done.

30(67) Q. Do the railroad companies receive all of their coal from the contractors mentioned in your petition, or do they have to buy other coal in the open market?

A. Oh, yes; this supply that we get from these mines represents only, of course, a portion. The Seaboard Airline receivers, I suppose, consume over a million tons of coal a year; and, of course, this is just a part of their coal supply.

Q. You signed the petition filed here, Mr. Plummer, as attorney for the Seaboard Airline Railway Company, did you not?

A. I signed the petition as general counsel for the receivers.

Q. You ask in this petition, for the return of all assessments paid and other payments made by the applicants prior to the effective date of this order. Do you know of any payments that you have made?

A. I don't know whether the Seaboard receivers have made any payments. We wrote a letter, concurrently, I think, either just before or just after the petition was filed, in answer to an inquiry which came to us from District No. 8, asking whether the receivers are going to pay this assessment levied under section 3 (b) of the Act. We wrote the District Board that this petition was being filed, asking if it would be satisfactory to

30(68) them to withhold any payment of it pending action of the Commission upon this petition. That was on the ground, of course, that if we obtained this exemption or are entitled to it, then we are not liable to that 3 (b) assessment, because that is a provision of the Code—not under 3 (b) assessment. It is under some provision of section 4—4 (b). That is my recollection.

Q. The Seaboard Airline Company receivers have accepted the Code, have they not?

A. Yes, sir.

Q. Have the contractors mentioned in this petition, Daniel Pritchard and the Peerless Coal Company, accepted the Code?

A. It is my understanding that they did, as far as the receivers are concerned. I think as far as the operators are concerned, they have, of course, accepted membership in the Code with full reservation of their legal rights pursuant to a provision of the Act itself, which says that they shall not be estopped or precluded on their part from contending that they are not subject to the Code or the provisions of the Act.

Q. With reference to the William Anne mine, who operated that mine before the receivers took it over?

A. I cannot answer that question; but, based on information that Mr. Pritchard gave me during my previous 30(69) testimony, I understand that it was operated by the corporation. Just what company that was I don't know. We had no transactions with that company at all as far as I know. I don't know of any.

Q. Your contract or lease was made between the United Thacker Coal Company and the Cole and Crane trustees?

A. Yes. I may explain there, if I may repeat, what I said. Those companies had previously leased or conveyed the coal in this mine to this corporation which had previously operated it. That corporation owned at the time of that lease the mining equipment. That corporation defaulted in the performance of its lease provisions. The lease was terminated by due notice by the United Thacker Coal Company to the Cole and Crane trustees; and they repossessed or recaptured, rather, the mining equipment and machinery in the foreclosure of a lien which their lease gave them.

That invested the title to this mining equipment in the United Thacker Coal Company and the Coal and Crane trustees or one or the other of them. I don't know which one of them owned it. That was the status of the thing at the time that the receivers made this contractual arrangement with the operator, and at the time they obtained this conveyance from the mine owners.

Q. How big a tract of land does this lease cover?

30(70) A. I cannot answer that, but it is all described in the lease. I think the acreage is given in there. Do you recall that, Mr. Cocke?

Mr. COCKE. The lease which we introduced in evidence will show that. However, Mr. Tines will succeed Mr. Plummer on the stand as a witness for us, and I think he can give you all of that detail.

The EXAMINER. Is Mr. Tines one of the operating officials?

Mr. COCKE. He is counsel for the United Thacker Coal Company.

The EXAMINER. Are you going to introduce any witness who is an operating official of any of the companies involved here?

The WITNESS. Do you mean the landowners, or the operators?

The EXAMINER. Of the mining companies themselves.

The WITNESS. If the Examiner desires to hear any of them on any point, we have them here ready to go on.

Mr. HARRINGTON. Well, Mr. Plummer seems to be very familiar with all the terms and conditions of all the contracts that are drawn up here; and I think he is qualified to testify here on cross-examination the same as he has testified on direct examination.

Mr. COCKE. I am not questioning your right to examine 30(71) Mr. Plummer, Mr. Harrington. I said that any details that Mr. Plummer is not entirely familiar with Mr. Tines could supplement in any way that we have information.

Mr. HARRINGTON. What was that last question?

The WITNESS. You asked me if I was familiar with the acreage and what acreage was involved; whether it was large tracts of land or not; and I said that I cannot answer that. The lease here, of course, will answer that. The properties are described in that by metes and bounds.

By Mr. HARRINGTON:

Q. I just wanted approximately the acreage that was covered by the agreement.

A. I cannot tell you what acreage it is. I don't know.

Q. Then the contract was made with the Glamorgan Mining Company to operate the property?

A. You are speaking now of the William Anne mine?

Q. The William Anne mine.

A. The contract for operation was made with Mr. Daniel R. Pritchard individually as the operator of this mine for the receivers.

Q. That was a contract with Pritchard?

A. Yes; that is the one. It is tied in with the United Thacker Coal Company grant.

Q. That is the William Anne mine?

30(72) A. That is the William Anne mine. Yes, sir.

Q. Is Mr. Pritchard considered an independent contractor in your contract with him to operate this mine?

A. Of course, that is a question, I suppose, of law, to be determined from the facts and circumstances of the case. In my opinion, if you desire me to state it, I think that Mr. Pritchard is operating the mine—that is, the William Anne mine and the Chilton Block mine—as a party employed by the receivers for that purpose; and I think that the receivers are producing coal at those mines through the agency or instrumentality of Mr. Pritchard.

Q. In the contract he is mentioned as an independent contractor.

A. That is in there to protect the receivers against claims or possible claims of third parties.

Q. Your liability is limited from the acts of Mr. Pritchard in the operation of this mine?

A. We are protected under the contract provisions against any liability, and we certainly have a right of reimbursement there against Mr. Pritchard, I think, for—

Q. Will you please answer my question, and then you may make a statement afterward.

A. Yes.

Q. I believe in your contract with Mr. Pritchard the receivers had a right to reject certain coal that does not
30(73) live up to certain specifications. Is that true?

A. I think that is correct. Yes.

Q. Do you know what is done with that coal when it is rejected?

A. No; I have no knowledge of that. I don't know whether any of the coal has ever been rejected. I understand that it has all been in compliance with these requirements.

Q. Does Daniel Pritchard do business as a sole trader or is he incorporated?

A. He does business as an individual only. He is not incorporated. We perfected our relations with him or our arrangement with him as an individual.

Q. Does he have the exclusive right to hire and discharge miners in the operation of the mine?

A. I think he does.

Q. Does he pay the Social Security tax and any other tax that might occur in the operation of his mine?

A. What do you mean by "any other tax"?

Q. I mean personal property tax.

A. For instance, the tax assessed under this Act?

Q. The tax assessed on the improvements and the Social Security tax on his employees.

A. Well, I think he pays all taxes of that character except the Social Security tax. He is expected to get 30(74) reimbursement out of the compensation which the receivers pay him.

Q. I am just asking you now whether he pays the taxes.

A. I think he does, so far as I know. I imagine he does.

Q. Now, in your lease contract with the owners of the fee, does that lease cover or include the improvements at the tippie?

A. Of course, the lease speaks for itself on that. But my recollection of the provisions of that lease is that the landowners, that is, the owners of this mining equipment and machinery, and so forth, agreed to permit the contractor or the operator to use that mining equipment in the conduct of the mining operations at this mine. Just what the arrangement is between the contractor and the operator and the landowner as to the—

Q. The use of it?

A. The use of it and as to the compensation I don't know. But the point that I am trying to make is that the contract that they have with the landowners obligates the landowners—

Q. To permit the contractor to use the mine?

A. To permit the contractor to use this mine and equipment and property.

Q. That the contractor is responsible to the landowner 30(75) for any damage that might occur to the improvements on the property?

A. I should say he was. Of course, I want to say right through that that is an arrangement, of course, in which those improvements and machinery were owned by Glamorgan Coals, Incorporated, and not by the landowner. The Glamorgan Coals, Incorporated, in its contract with the Seaboard receivers agreed to use that mining equipment and property in the contract of these mining operations.

Q. Who owns the fee in the Glamorgan mine?

A. The Glamorgan Coal Corporation.

Q. The Glamorgan Coal and Land Corporation?

A. Yes; it is a separate and distinct entity from the Glamorgan Coals, Incorporated.

Q. What company was foreclosed on and the property sold—the Glamorgan Coals, Incorporated, or the Glamorgan Land Corporation?

A. You mean recently?

Q. Yes; recently. The sale of August 23.

A. That was the Glamorgan Coals, Incorporated, the operators.

Q. All that they lost, then, was the improvements and the property at the time of that sale?

A. They lost the improvements and the property.

30(76) Q. And the title to the property rests in the Glamorgan Coal and Land Company?

A. Yes; the Glamorgan Coal and Land Corporation.

Q. The Glamorgan Land Corporation?

A. The Glamorgan Land Corporation.

Q. The Peerless Coal Company, then, is only the owner of the improvements and the property?

A. That is my understanding. I think that as a natural result of the sale of the properties and assets of the Glamorgan Coals, Incorporated, was that the Glamorgan Coal and Land Corporation acquired through foreclosure of its lien, which was an old lien for royalties due to this company some years ago, and then it foreclosed that lien, and the Glamorgan Coal and Land Corporation purchased at this sale this mining equipment and property which previously belonged to the Glamorgan Coals, Incorporated. Now, I think that the same arrangement has been made between the Glamorgan Coal and Land Corporation and the Peerless Coal Company under which the Peerless Coal Company has acquired the right to use this mining equipment and property in the operation of this mine. That is the way that the situation stands.

30(77) Q. Well, now, as a matter of fact, the Peerless Coal Corporation is the contractor at the Glamorgan mine at this time, is it not?

A. Oh, yes.

Q. There has been a separate contract made between the receivers of the railroad and the Peerless Coal Corporation?

A. Yes.

Q. Which has been introduced in evidence?

A. It is a separate contract in the sense, as I stated before, that the Peerless Coal Land Corporation at the sale bought in the right, title, and interest of the Glamorgan Coals, Incorporated, or its receivers in this contract with the Seaboard; and they bought it subject to the assent of the Seaboard, because the contract is not assignable without the assent of the Seaboard. They bought in the lease under that contract subject to the assent of the Seaboard receivers. The Seaboard receivers have recently, following that purchase, entered into a contract with them under which they have assented to the transfer to the Seaboard of this contract to the Peerless Corporation. The Peerless Coal Corporation has agreed in that contract to continue to perform and carry out the

obligations of the contract on the part of the operator to be carried out and performed.

Q. Your petition alleges that A. E. Stone and Walter C. Shunk as receivers of the Glamorgan Coals, Incorporated, are the operators of Glamorgan mine. Is that correct?

A. Yes, sir; that is correct. They were at the time the petition was filed.

Q. At the time the petition was filed?

A. This other development has since occurred.

Q. Who are the real operators now of the Glamorgan mine?

A. The operator now is the Peerless Coal Corporation.

Q. Is that company in receivership?

A. No; that is a newly organized company, organized at the time that the rights under this contract were purchased. It is a recently organized company.

Q. How does that company operate in reference to the production of this coal?

A. They operate in identically the same way that the Glamorgan Coals operated before.

Q. They have adopted the Glamorgan Coals contract?

A. Yes; they adopted their contract and assumed and agreed to carry out its performance.

Q. The receivers, then, agreed to and do pay the Peerless Coal Corporation on a cost plus basis?

A. No; it is not a cost plus basis at all.

Q. On a straight cost?

A. It is an agreed flat compensation per ton.

Q. A flat compensation based on cost?

30(79) A. No; I don't know what it is based on. It is based on a bid submitted. It is a flat sum which presumably includes all the cost and is designed to give the operator some profit. Otherwise I don't suppose he would have submitted it.

Q. Do the receivers have any control over the Peerless Company in the operation of the mine?

A. In what aspect?

Q. With reference to the employment of the miners or in reference to directing them how they shall mine the coal.

A. Not that I know of.

The EXAMINER. You are addressing these questions to the Glamorgan Company, are you?

Mr. HARRINGTON. No.

The EXAMINER. Exhibit No. 2, or to all three mines?

Mr. HARRINGTON. The Glamorgan mine, that is being operated by the Peerless Coal Company.

The EXAMINER. That is the one that you are addressing these questions to, or do you mean all three of them?

Mr. HARRINGTON. I am addressing it only to the Glamorgan mine.

By Mr. HARRINGTON:

Q. The receivers for the railroad company hold a lease on the Chilton Block No. 1 mine, do they?

30(80) A. Yes.

Q. That is a lease giving them the right to mine the coal in that particular mine?

A. Yes.

Q. They don't own the fee in there, do they?

A. No; it is the same nature of title as in these other cases. In other words, in my opinion and judgment—the contract will determine that—the Dingess Run Coal Company, who operated it at the time it was transferred to the receivers—the transfer was assented to by the Dingess Run Coal Company. We in effect own this coal. We have acquired it in this privity of assent by the Dingess Run Coal Company to the Seaboard receivers in respect to this coal.

Q. Do you operate that on the royalty basis, the same as you do the others?

A. Yes.

Q. Paying so much a ton?

A. We pay so much a ton royalty to the landowner or for his account.

Q. This property is operated by Mr. Pritchard as contractor?

A. Yes; the Chilton Block No. 1 is operated by Mr. Pritchard individually.

Q. How do you pay Mr. Pritchard?

30(81) A. We compensate him there on a flat sum per ton basis. It is the same arrangement, identically on the same arrangement, as in the William Anne mine.

Q. How do you pay him? By the month or week or how?

A. We pay him by the month, except that sometimes maybe when he gets a little hard up he may want some a little earlier; and we let him have it on account. We pay him monthly on monthly statements.

Q. Do you give him a check for the coal that he has delivered in the cars to you for that month?

A. He reports the cars. We receive his report on these cars as to loading and so forth and weights and tonnage, and the tonnage is computed from that; and on that basis the flat sum per ton is multiplied by the number of tons, and he is paid on that basis; and the receivers based on that pay directly to the

landowner or for the landowner's account the royalty on that coal.

Q. You pay the royalty? The receivers pay the royalty?

A. Yes. The receivers pay the royalty.

Q. And the contractor pays all other obligations against the property?

A. He pays all—

Q. Taxes?

A. Yes. He pays all taxes, except that he does not 30(82) pay such taxes, for instance, as are assessed under section 3 (a) of this Act. He does not pay taxes to the landowner on the land. The receivers pay those taxes.

Q. He pays the taxes on all the improvements?

A. I think under an arrangement he pays the taxes on that. Mr. Tines will probably have to elaborate that a little for you, because that is determined to some extent on the arrangement between the landowner and Mr. Pritchard under which he is permitted to use this mining equipment and property. He can testify as to that.

Q. Does the Seaboard Airline Railway connect with all these properties that are involved?

A. They have no connection with them at all. They are all located on other railroads.

Q. What arrangement is made as to the payment of freight on the railroads after the coal is loaded into cars and before it is received by the Seaboard Company or the receivers?

A. We have another witness to testify as to that. But my understanding as to how that is handled is that the cars are loaded and shipped by the operator for the account of the receivers and consigned to the receivers. The receivers pay for the coal. These shipments are made at the receivers' 30(83) risk, and as coal owned by them. In the event that a wreck or something off-line happens, then the receivers would have to stand that loss, unless, of course, and to the extent that they could recover from the off-line carrier.

By Mr. COCKE:

Q. They pay the freight?

A. The receivers pay the freight.

By Mr. HARRINGTON:

Q. Do you know where the inspection takes places on this coal by the receivers?

A. No; I do not. I don't know just where it is inspected. I think it is in the mine, but I don't know.

Q. I beg your pardon?

A. I imagine it is at the mine. I don't know where it is inspected.

Q. Do you have a witness here who can testify to that?

A. Yes; we can show that by another witness.

Q. Mr. Plummer, can you explain to us the provision in the contract which provides that in the event that you can purchase coal in the open market for ten cents below the price set in the contract with your company, that you can declare the contract null and void?

A. I don't recall any such provision in the contract where it specifies a difference of ten cents at all. There is a provision in the contract to the effect that if the receivers—
30(84) by reference to ten cents you mean to refer to the royalty cost to the receivers? There is a provision in this contract which gives the receivers the right in the event that they can buy coal from other sources, acquire it from other sources, at a cost to the receivers, made up of the amount of compensation that they pay the contractor, plus the amount of royalty and taxes that they pay the landowner, then the receivers shall have the right to cancel the contract.

Q. I want you to explain that part of the contract.

A. That provision is in there. There is a further provision that the receivers have that right unless, upon my recollection, unless within 60 days the operator will reduce his price to meet it. That is just simply a provision put in there for the receivers' protection. That simply gives the receivers the right to determine whether they are going to continue this arrangement or not, depending upon how expensive it might be to them.

Q. In other words, if you can buy coal in the open market for ten cents less than the coal produced by your contractor costs you, you have a right to go out and buy that coal?

A. No; you mean under the provisions of the contract
30(85) now? That is a provision of the contract—that if we can buy coal somewhere else—

Q. That was what I was asking you about.

A. Yes; we have the right to go out and buy it. Yes. I think we can do that under the provisions of this contract. I don't recall just what that term is. That is my recollection. But I know that we have the right, if we find that we can procure coal somewhere else cheaper, we have the right to cancel this arrangement.

Q. Of course, this arrangement that you have with these contractors is more or less, I assume, for your own convenience in order to buy coal as cheaply as you possibly can? Is that true?

A. Of course, one purpose in making this agreement is to save

the receivers money in the cost of the coal. That is, of course, one of the objects in making the agreement. That is just an ordinary business transaction.

Q. Well, now, Mr. Plummer, you know as a matter of fact that the receivers have no control over the contractor in the production of his coal? Isn't that true?

A. In what respect do you mean?

Q. As to how much coal he produces.

A. No.

Q. Or how he will pay his employees?

A. Oh, yes.

30(86) Q. Or in what manner?

A. We do have control over that, absolutely, in that we have the right to specify the amount of coal which we require.

Q. In other words, the only obligation that you have is to specify how much coal you will want during the month?

A. No. We have the right to specify how much coal we want produced there at this mine.

Q. And what kind?

A. Not what kind.

Q. You have the right to reject this coal, have you not?

A. We have a right, of course, to require the contractor to produce this coal between maximum and minimum limits. That was put in there for the protection of the receivers in the event that there are fluctuations in their business and in their fuel requirements.

Q. The if the coal is costing you too much, ten cents too much, and if you can buy coal for ten cents below the price that the contractor bills you for, then you can declare this contract null and void?

A. Well, we can cancel the contract if we see fit. It is our own coal. We can continue to mine it or to produce it or not as we see fit.

30(87) Q. It does not have to be ten cents less. It can be any amount less?

A. That is why I asked you about the ten cents. I didn't recall any provision in there about ten cents.

Q. Any amount. If you can buy it in the market for any amount less than what he bills you for, you can cancel this contract?

A. That is simply for the receivers' protection.

Q. I am asking you if that is a fact.

A. Yes.

Mr. Cocke. The contract speaks for itself.

The WITNESS. The contract speaks for itself. That provision is in there. It is clear. I think you can see it.

Mr. HARRINGTON. But you are testifying under cross-examination.

The WITNESS. Sure. There is a provision in the contract which gives the receivers the right in the event that they find that they can procure coal cheaper than under this arrangement, to cancel this arrangement, in other words, to discontinue producing their own coal if they see fit to do so; the right to go out in the market if they want to if they can buy it cheaper than under this arrangement. Then they can cancel this arrangement with the contractor or operator.

30(88) By the EXAMINER:

Q. Mr. Plummer, has this arrangement at any time in the past been cancelled with any of the mines in question?

A. No. This arrangement—

Q. What in your opinion would be the result so far as the continued operation of the mine is concerned if such arrangement were cancelled?

A. Well, if such arrangement were cancelled, we would either have to make a new similar arrangement with somebody else who would be willing to perform the service for us at a cheaper cost to us, or we would have to go out and buy the coal. We have got to have the coal somewhere.

Q. But so far as the mine itself is concerned, the operator of the mine, would it mean a continuation of the operation of the mine, or would the mine cease to operate upon the cancellation of your agreement with it?

A. It would cease to operate unless we made a similar arrangement; unless the receivers elected to operate it themselves and go ahead and pay the required people to run it. We claim that we are doing that now; that we are simply doing that through the instrumentality of the contractor. In any event the receivers would still own the coal and would still be liable for the minimum royalties under the contract.

30(89) Q. It is your contention that the receiver has absolute management and control of the contracting mines as to the operation?

A. No. We don't contend that exactly. We contend, sir, that we own the coal; that it is our contract; and that the receivers are producing this coal through the agency and instrumentality of the contractor for the operator. It is the receivers' coal. The contractor has no interest or title in the coal at all. It is the receivers' own coal, in the ground continuously. The receivers own the coal until it is consumed and used.

Mr. COCKE. May I ask a question there that I think will clarify the situation, Mr. Examiner?

The EXAMINER. Yes.

By Mr. COCKE:

Q. If Mr. Pritchard's arrangement is cancelled on the William Anne mine, he cannot any further operate that mine except with the consent of the receivers?

The EXAMINER. That is my question.

A. Oh, no. Absolutely no. He has no interest in the coal at all. He has no right to dispose of it. None at all.

By the EXAMINER:

Q. Your answer would be the same as to the other two mines involved here?

30(90) A. The same as to the other two mines involved. Absolutely. He has no right to dispose of that coal. The sole right to dispose of that coal and the sole ownership of it is in the Seaboard receivers.

The EXAMINER. Pardon me, Mr. Harrington. I didn't mean to interrupt. I wanted to get that straight.

By Mr. HARRINGTON:

Q. Along that line of questions, you contend that the Seaboard Airline Railroad Company is the producer of this coal?

A. Yes.

Q. The actual producer in the operation of the mine?

A. We say that the Seaboard receivers are the producers of this coal.

Q. Then what do you think that this contract is, for the mining of coal?

A. I think that that is nothing in the world but an arrangement under which the receivers have employed these individuals to operate these mines for them.

Q. That is a matter of opinion anyway. I think you have answered that question.

A. That they are producing this coal through the agency and instrumentality of these operators.

The EXAMINER. I would like for the record to show specifically just which corporations are members of the
30(91) Code and which ones are not. In other words, I should like you to tell us which of the corporations involved in this proceeding are Code members, and whether or not Mr. Daniel Pritchard himself is a Code member. You stated that you didn't know, but that you thought that they were.

The WITNESS. If I may state that subject to confirmation as to Mr. Pritchard and as to the Peerless Coal Corporation, I

would say that the Seaboard receivers have accepted membership.

By the EXAMINER:

Q. You can answer that specifically as far as the Seaboard is concerned?

A. The Seaboard receivers have accepted membership in the Coal Code. It is my understanding that Mr. Pritchard has accepted membership in the Code. Is that correct, Mr. Pritchard?

Mr. PRITCHARD. No. I have not.

The WITNESS. Mr. Pritchard has not.

Mr. SHUNK, how about Peerless Coal Corporation?

Mr. SHUNK. The Code was accepted, Mr. Plummer, according to my information, by the receivers of the Glamorgan Coals.

The WITNESS. In other words, the predecessors in interest, which were the Glamorgan Coals receivers, accepted membership in this Coal Code. The Peerless Coal Corporation (92) is a very recently organized company; and I understand from Mr. Shunk that that company has not accepted membership in the Code.

Mr. SHUNK. We assume, since we purchased the contract, the new company purchased the contract, the Peerless Company, from the Glamorgan Coals receivers, that we are members of the Code therefore. We have not as a new company, Mr. Examiner, asked for membership in the Code. We assumed, since we purchased the contract from the Glamorgan Coals with the Seaboard Airline receivers, that they had accepted the Code and had become members.

The EXAMINER. I understand that that is your contention. But the fact is that the Peerless Coal Company as a corporate entity is not a Code member? Is that correct?

Mr. SHUNK. Yes, sir.

The EXAMINER. Now, with reference to the others?

The WITNESS. That is all that are involved—the Seaboard receivers, of course, and the landowners. The landowners are not producing the coal, so they are not involved. The Peerless Coal Company and Mr. Pritchard are the operators, you see.

By Mr. HARRINGTON:

Q. Mr. Plummer, does the Seaboard Airline Company have any control over the purchase of supplies by the contractor in the operation of the mine?

A. They have control in this aspect: that we have a right, of course, to check up the supplies purchased and so forth. We have the right to keep, you might say, abreast of how the contractor's costs are running.

Q. I mean direct supervision over the purchase of supplies.

A. No; we don't control the purchase of supplies. He can purchase them, of course, as his requirements necessitate.

Q. Did I understand you to say, Mr. Plummer, that the contractor does make a profit on the price that he charges the railroad for the coal?

A. I cannot answer that. I don't know if he does or not. It is his risk whether he makes a profit or how much he makes. It is a flat sum per ton compensation to him.

Q. In your contract with Mr. Pritchard on the William Anne mine does the contract provide for a cost basis? Is it based on the cost of the coal?

A. No; it gives the receivers the right at their option to change this method of compensation, which is a flat sum, from that flat sum per ton compensation to a cost plus basis if they so elect. But the receivers have never availed of that privilege.

Q. I am not referring to that particularly. I am 30(94) referring to this figure mentioned here in the contract of \$1.66 per ton. What does that figure refer to?

A. I don't know. That is an offer or price submitted by Mr. Pritchard, and presumably it includes his estimated cost and a reasonable profit to himself for the service that he performs.

Q. That is the figure that has been accepted as part of this contract in Exhibit 6, isn't it?

A. We have accepted it.

Q. That is the contract figure, isn't it?

A. That is what we are paying him, plus the amount that we have to pay in royalties to the landowners and the taxes that we have to pay.

Q. I am speaking of the contract now; not anything that you spend outside of it.

A. Yes; that represents the cost.

Q. That represents the cost?

A. That represents the cost, except that in addition to that the receivers pay the section 3 (a) taxes. They pay them direct on the theory that we are the producer of the coal and consuming it. We pay that tax, which is one cent per ton.

Q. Now, that sum includes the four cents per ton that is paid as Social Security taxes?

A. Yes.

30(95) Q. And it also includes the 14 cents a ton, the amount of the increase in wages effective on and after April 1st, 1937?

A. That is right. Yes, sir.

Q. And it includes two and a half cents per ton on account of the increase of cost of unsigned materials and supplies?

A. That is right. And the reason for that, I might point out to you, is that, of course, those figures were based on estimates when

this contract was made. The receivers have the right to check those items; and if they find that, as you have just read—

Q. They have already been accepted, haven't they, at the contract price?

A. They have been accepted, subject to the right of the accounting department to check these figures.

Mr. HARRINGTON. Oh, yes. I have no further questions.

The EXAMINER. Mr. Ansell, do you have any cross-examination?

Mr. ANSELL. I suggest that Consumers' Counsel may have some examination.

The EXAMINER. Does Consumers' Counsel have any examination?

Mr. EICHELBERGER. No questions.

30(96) Mr. ANSELL. Then I should like to borrow from Consumers' Counsel copies of the exhibits that we had this morning.

The EXAMINER. I can let you have mine or any ones that are available here.

Cross-examination by Mr. ANSELL:

Q. Mr. Plummer, I believe you stated on direct examination, and I direct your attention particularly to the William Anne mine, that the original lease entered into for the right to the coal contained in that property was for a period of one year, with terms of renewal for one year. Isn't that a fact?

A. What was the date of that?

Q. It was entered into on May 1, 1934, and terminable July 1, 1935, which is a period of 14 months.

A. That may be so.

Q. And there was a renewal provision.

A. Renewable for successive yearly periods, I think, after June 30, 1935. Those periods are somewhat changed by supplements and so forth.

Q. Do you know why the original lease was entered into for a period of 14 months?

A. What period do you mean?

Q. May 1, 1934, to July 1, 1935.

30(97) A. I think the reason for that was this: that it is my recollection that the Seaboard—and I think the other railroads in the country—usually negotiate for their coal supply in the latter part of June for the first part of July, maybe May or June. However, there are other witnesses here that can indicate that. We had in mind that fact in fixing the term of that lease.

Q. I assume that the termination date, July 1, 1935, was set without any relation to the expiration of the National Industrial Recovery Act?

A. Oh, yes.

Q. You don't believe that that was considered at all?

A. Absolutely not.

Q. Without attempting myself to follow the successive leases through, I come to one in the William Anne mine, Exhibit 2 dated April 14, 1936.

A. Do you know what the nature of that is? I am asking so I can identify that particular agreement.

(Mr. Ansell handed a paper to the witness.)

The WITNESS. What is your question?

By Mr. ANSELL:

Q. Can you explain why that was entered into on April 14, 1936, if the periods of renewal of the lease were to run for periods of one year starting July 1, 1935?

A. Well, in each successive year it was up to the 30(98) receivers to determine whether or not they were going to exercise this right of renewal. While it is true that the grant for this particular year did not expire until June 30, 1936, in April 1936, the receivers simply determined that they were going to exercise that right of renewal; and they negotiated an extension with the landowners. That is the only reason I know for it. Just a minute. Let me read this further provision. My recollection is that it would appear from the provision in that contract at that time that a decision was expected from the Supreme Court on this Collard Coal Company case.

Q. What would that have to do with this?

A. It simply involved a testing of the legality of this Guffy Act.

Q. How did that affect you people?

A. So far as the legality of the contract is concerned we felt that it did not affect us.

Q. Did not affect you?

A. Did not affect us. But naturally, just like any other business proposition, we felt that if the Act was declared unconstitutional, the whole market would probably break, and it might be more advantageous for us to go out and buy the coal rather than to continue the captured mine arrangements. 30(99) Therefore we just simply provided that they might have an interim extension, and then later we extended it further.

Q. So on April 14, 1936, rather than giving notice to the United Thacker Coal Company and the Coal and Crane Trustees that you would extend this lease for a period of a year, you in effect advised them that you would extend it for a period of a

year in the event that the Supreme Court did not hold that the first Guffy Act was unconstitutional in the meantime?

A. I don't think that that is the effect of it at all. It is simply a precautionary measure by the receivers to put themselves in the position of leaving themselves free in the event that the Guffy Act should be declared unconstitutional and the coal market should break and they found that it would be more expensive to them to obtain coal this way, to terminate the contract and let it fall at the end of the year.

Q. There is another part of Exhibit 2, a supplementary indenture dated May 14, 1936. I ask you if you can tell me why that was entered into [handing a paper to the witness].

A. Let me see now what this says. [After looking at paper.] That seems to have been an interim extension or an extension for a short period from July 31, 1936 to and inclusive 30(100) of August 26, 1936; and I suppose that, while there isn't any reference in this to the Guffy Act, I suppose that it is pending legislation for the same reason that induced the receivers to agree on that interim extension to hold this question open as in the other case.

Q. Without my referring to the copies of the leases in the case of the Glamorgan mine and the Chilton Block No. 1 mine, Mr. Plummer, can you tell me whether similar supplemental indentures were made in those cases?

A. Those contracts speak for themselves. But my recollection is that it was not necessary in those cases, for the reason that the first renewal of the lease from the Glamorgan Coal and Land Corporation and the related arrangement, contractual arrangement, with the contractor, was extended for a period of two years—that is my recollection of it—with a further right of renewal. In the case of the Chilton Block mine my recollection is that that lease arrangement was originally for one year; and that it was afterward extended under the optional renewal provision.

Q. I believe you stated upon cross-examination by counsel for the Commission that in your opinion, although Mr. Pritchard was described in certain leases as an independent contractor, he was in fact an employee of the Seaboard Airline Railway or its receivers?

30(101) A. That is my opinion. I think he is very properly under the decision of the courts entitled to act in that dual relationship. He can be an agent between the parties and at the same time can be an individual contractor as a third party.

Q. So that the only control which the receivers of the Seaboard Airline Railways exercised over Mr. Pritchard was in the speci-

fication of the tonnage that was to be delivered over certain periods of time. Is that true?

A. That is my recollection. But again the contracts will have to speak for themselves. But that is my recollection of the fact—that the receivers did not retain under these contract provisions any control over Mr. Pritchard's employment of his miners and the manner in which he could do the work, except I believe there is a provision in the contract requiring him to comply with all lawful regulations and so forth with respect to that.

Q. When you speak of the contract speaking for itself, do I understand you to mean that all control which the Seaboard Airline Railway Company or its receivers may exercise over Mr. Pritchard is expressed in that contract?

A. I should say so.

Q. Do you know whether there is a labor contract with any labor organization for the mining of the coal at the William Anne mine?

30(102) A. I don't know.

Q. Was there any entered into by the receivers of the Seaboard Airline Railway Company?

A. No.

Q. Mr. Plummer, what did the Peerless Corporation acquire by reason of this purchase on August 23, 1937, of all the right, title, and interest in the Glamorgan Coals, Incorporated, or its receivers under the Seaboard Airline agreement?

A. It acquired the same rights and interest under that contract which the Glamorgan Coal Corporation or its receivers had previously enjoyed. In other words, whatever rights they had, they acquired.

Q. Do you know what rights they had?

A. Yes; they had the right of compensation, for instance. They had the right to perform this work under the contract. And they had the right to require payment of compensation for the work and service which the contract provided. That, of course, is subject to the assent of the Seaboard receivers, because of a provision in the contract which prohibits the transfer of the assignment without their consent.

Q. So that the transfer would be a sale?

A. I should say that it would mean a sale of the right to mine the coal. I think that that was the language
30(103) of the decree. I don't remember it. I think that a copy of that decree was filed.

Mr. COCKE. Yes; it has been filed.

A. (Continued.) You will find it in that decree. Of course, you understand that Glamorgan Coals, Incorporated, and the receivers of the Glamorgan Coals, Incorporated, have no title

whatever to this coal. All that they had was a contractual right under the agreement to mine this coal for the receivers, and to receive compensation for it. That is what passed in this transfer to the Peerless Coal Corporation.

By Mr. ANSELL:

Q. Mr. Plummer, I believe you stated on direct examination that shortly prior to or about the time that you originally entered into the contract of lease with the United Thacker Coal Company and the Coal and Crane Coal Company as trustees for the right to mine the coal at the William Anne property you or other representatives of the receivers of the Seaboard Airline Railways approached Mr. Richberg with reference to that transaction.

A. Yes.

Q. Why were they approaching Mr. Richberg?

A. Well, the receivers, as I stated before in my testimony, counsel for the receivers and counsel for the landowners, 20(104) and also counsel for the operator which was involved in this proposed transaction, unanimously agreed that there was nothing whatever in those arrangements violative of the N. R. A. Code provisions. However, the receivers are operating these properties under the direction of the Federal Court; and the receivers naturally felt that maybe some charge might be made that they were seeking to evade the provisions of this Act, and they preferred before they made these arrangements effective that Colonel Ansell and I go to Washington and confer with Mr. Richberg and lay the plan before him and obtain his approval and the approval of the Code authorities, which we did.

Q. Who do you mean by the "Code authorities"?

A. The Bituminous Coal Division. My recollection was that Mr. Richberg stated that the head of the coal division was the party that he had conferred with.

Q. You don't know who that was?

A. No; I don't know.

Q. You yourself saw Mr. Richberg on that occasion?

A. Absolutely. Yes, sir.

Q. What question did you present to Mr. Richberg?

A. We simply gave him a memorandum, a short memorandum, in which we outlined the essential features of this plan—first, the acquisition of the title to this coal by the receivers 20(105) through the owner, the employer of a contractor or operator by the receivers to produce the coal, and pointing out that this coal was to be used and consumed by the receivers in the operation of the railroad. That was the sub-

stance of the plan. That is the substance of these plans, and it is still in effect in each case in all its essentials.

Q. You state that all interested counsel were in accord that the agreement was not violative of the Code?

A. I mean that it was not violative. I mean it did not conflict with any Code provisions.

Q. What was the effect of the agreement insofar as it related to the Bituminous Coal Code under the N. R. A.?

A. My recollection is that there was some price provision in the N. R. A. Code. I don't remember. I think there was something of that sort. In other words, they established prices in the N. R. A. Code for coal in sales, didn't they?

Q. I just want you to testify.

A. That is my recollection, that they did. They published and established and promulgated a code for bituminous coal, and in that code they established certain prices.

Q. The effect of your agreement was to remove the coal which is supplied to the Seaboard Airline Company 30(106) through these mines from the operation of the price provisions of the N. R. A. Code?

A. No. I wouldn't put it exactly that way. The object of these arrangements was to enable—

Q. I am speaking of its effect, Mr. Plummer.

A. Well, all right. The effect. Put it this way: The purpose and intent and effect of these arrangements was to enable the receivers to procure a coal supply at less cost to the receivers than if they had to go out in the open market and buy the coal.

Q. That is, at less than the Code prices?

A. Well, yes. They naturally were seeking to save money. They wanted to buy the coal as cheaply as they could. So they conceived the plan of buying the coal in the ground and employing these parties to produce it for them.

Q. I believe you stated that subsequent to this conference with Mr. Richberg you received a telegram from him?

A. Yes.

Q. Do you have that telegram with you, Mr. Plummer?

A. No. I haven't it with me, but I would be glad to file a copy of it. In fact, the telegram is not addressed to me. It was addressed to Colonel Ansell. I think we filed a copy 30(107) with that memorandum; copies of that telegram, with the N. R. A. Code authorities at the time and later.

Q. You speak of the N. R. A. Code authorities. Do you know what Code authorities they were?

A. It was the Bituminous Coal Division. That is my recollection of it. The division under which a code was established

for bituminous coal under the N. R. A., under which that coal was administered by what they called the Bituminous Coal Division. That is what I mean by "the Code authorities." I mean the parties that were charged with the administration and so forth of that Code, and of the promulgation of it.

Q. Do you mean the Board of Operators that administered the Code?

A. No. I don't know just how the thing was created. It has been so many years ago. I have forgotten.

Q. Do you know where it was filed?

A. Where what was filed?

Q. Copies of that telegram and memorandum.

A. I think it was the District Board. But I think that we filed a copy of that with the then District Board created under the N. R. A.

Q. In Cincinnati?

30 (108) A. My recollection is that it was in Cincinnati. I can very easily and would be perfectly willing to let the Commission have copies of that correspondence if they desire it.

Mr. ANSELL. I have nothing further.

Mr. COCKE. I would like to ask Mr. Plummer one or two questions.

Redirect examination by Mr. COCKE:

Q. Mr. Plummer, under the provisions of these three sets of instruments, if in any one or more cases of rights reserved in the contracts with the contractors the receivers should terminate the arrangement with the contractor, would that either directly or indirectly relieve the receivers of the continuing obligation to pay the royalties to the owners of the properties, the lessors of the properties?

A. In the case of the William Anne mine and the Chilton Block mine it would not. We would still be liable for the royalties under the contract. My recollection is—and I will let Mr. Ansell speak for himself—that in the case of one or more mines we have a corresponding provision in our lease on the Glamorgan Coal and Land Corporation to the receivers which gives us the right in the event that we should terminate the contract or arrangement with the operator, that then we have the
30 (109) right to terminate the lease. In these other cases that right does not under the existing contracts exist.

Mr. COCKE. That is all.

30 (110) The EXAMINER. Mr. Harrington, do you or Mr. Sneed have any question?

Mr. HARRINGTON. No questions.

The EXAMINER. I would like to ask one clarifying question, a series probably in one, Mr. Plummer. I recognize that this situation is clear to you gentlemen because you are very familiar with it. It is just a bit confusing to me. There are about seven corporations involved in this particular proceeding, aren't there?

Mr. PLUMMER. Yes, sir.

The EXAMINER. Now with reference to the United Thacker Coal Company, it is a corporation?

Mr. PLUMMER. United Thacker Coal Company is a corporation; yes, sir.

The EXAMINER. Where is that incorporated?

Mr. PLUMMER. I can't answer that. Mr. Tynes, in what State is United Thacker incorporated?

Mr. TYNES. In Maine.

The EXAMINER. Do the receivers of the Seaboard Airline own any of its stock?

Mr. PLUMMER. None whatever.

The EXAMINER. Do you know anything concerning the stock ownership of the United Thacker Coal Company?

Mr. PLUMMER. I have no knowledge of it, but I do know neither the Receivers nor Seaboard Airline Railway owns any of it.

30(111) Mr. COCKE. Or any officer or director.

The EXAMINER. With reference now to the Peerless Coal Corporation, do you know where that corporation is organized?

Mr. PLUMMER. It is organized as a corporation in the State of Virginia.

The EXAMINER. And do you know anything concerning the stock ownership of the Peerless Coal Company?

Mr. PLUMMER. I do not, but I know neither the Seaboard Airline nor its receivers own any of the stock.

The EXAMINER. Is there anyone here who can testify concerning that?

Mr. PLUMMER. Yes; Mr. Shunk.

The EXAMINER. I should like for Mr. Shunk to be called as a witness in that respect.

Now with respect to the Glamorgan Coal Land Corporation, where is that organized?

Mr. PLUMMER. That is a corporation of Virginia.

The EXAMINER. And the same question with reference to the ownership of stock.

Mr. PLUMMER. The Seaboard Receivers or Seaboard Airline Company has no interest whatsoever in the stock and has no representatives on its Board.

The EXAMINER. And do you know anything concerning the stock ownership of that particular corporation?

Mr. PLUMMER. Except as hearsay. I understand Mr. 30(112) Kelly, who is here, is one of the stockholders and he will testify as to that.

The EXAMINER. With reference to Glamorgan Coals, Inc., where is that organized?

Mr. PLUMMER. That is defunct. It passed out of existence. It was a Virginia corporation.

The EXAMINER. And it is in receivership or just defunct.

Mr. PLUMMER. It is virtually closed out. It is in receivership and all properties and assets have been sold.

The EXAMINER. And they have been purchased by whom?

Mr. PLUMMER. As I stated, I think the mining equipment and property have been purchased by Glamorgan Coal Land Corporation. Glamorgan Coal Land Corporation, I understand, has leased that mining property to Peerless Coal Corporation. Neither Seaboard Receivers nor Seaboard Corporation have any stock ownership or interest in either one of them.

The EXAMINER. The Chilton Block Coal Company is a corporation, is it not, and do you know where it is organized?

Mr. PLUMMER. That is a West Virginia corporation.

The EXAMINER. And what do you know concerning the stock ownership?

Mr. PLUMMER. Neither the Seaboard Receivers or Corporation have any interest in it.

The EXAMINER. And is there someone here who can testify as to the stock ownership of the Chilton Block Coal Company?

30(113) Mr. PLUMMER. Yes, sir.

The EXAMINER. I understand there are no further corporations involved in this proceeding other than those that I have questioned you about just now.

Mr. PLUMMER. None whatever.

The EXAMINER. How about the Dingess Run Coal Company?

Mr. PLUMMER. I think that is incorporated in West Virginia. Neither the Seaboard Airline nor the Seaboard Receivers have any interest whatever in that corporation, in the stock ownership or otherwise.

The EXAMINER. Do you know what person or persons own the stock of that particular corporation?

Mr. PLUMMER. I do not.

The EXAMINER. Is there anyone here who could testify as to that?

Mr. COCKE. I don't think so, unless Mr. Tynes might. He will testify right after Mr. Plummer.

Mr. HARRINGTON. Did you say who owns the stock of the Chilton Block Corporation?

Mr. PLUMMER. I can't say. The Seaboard Receivers and Seaboard Airline Railway Company have no interest whatever in it.

Mr. HARRINGTON. Do you know whether Mr. Pritchard owns the majority of the stock in that corporation?

The EXAMINER. A witness will be put on the stand who will testify with reference to that, Mr. Harrington.

30(114) BuFORD C. TYNES, called as a witness for and on behalf of the applicant, was duly sworn and testified as follows:

DIRECT EXAMINATION

Mr. COCKE. Will you state your name and initials for the record?

Mr. TYNES. My name is Buford C. Tynes, Huntington, West Virginia, a lawyer by profession, and interested in the coal business.

Mr. COCKE. Mr. Tynes, what connection if any have you with the United Thacker Coal Company, one of the concerns about which testimony has previously been given in this hearing?

Mr. TYNES. I am vice-president and general counsel of that corporation, and have been such for the last ten or twelve years. Prior to that time and back as far as 1919 I was general manager and general counsel. As vice-president I am in charge and have been for those years of the company's physical properties in West Virginia, including all its coal and timber lands.

Mr. COCKE. Mr. Tynes, will you state what relationship the United Thacker Coal Company has by way of ownership or otherwise to the coal properties known as the William-Ann mine and leased to the Seaboard Receivers?

Mr. TYNES. In that connection, Mr. Cocke, if you will permit me I will go far enough afield of your question to
30(115) answer some of the questions that apparently were in the Examiner's mind, and also counsel for the Board, shall I?

The EXAMINER. That would be satisfactory, subject to any objection counsel may have to offer.

Mr. TYNES. The United Thacker Coal Company owns a little over 60 percent of what is known in the record as the William-Ann leasehold in Mingo County. The Coal & Crane Real Estate Trust owns the remaining 40 percent of that acreage. The acreage is owned in severalty by the respective owners as I have named.

Mr. COCKE. That means a fee ownership in the land.

MR. TYNES. A fee ownership is the land. The properties of the two ownerships were co-mingled in such a way so that no part of the coal leasehold which approximates 4,000 acres could be leased by either of the two land owners separately. The United Thacker Coal Company owns the frontage in fee simple. The Cole & Crane ownership is around in the center of the 4,000 acre boundary, for all practical purposes. To give the background, in 1922 the two landlords leased the property to the William-Ann Coal Company, which operated the property to the fall of 1933, sometimes successfully and sometimes not successfully, with the result that as of the fall of 1933, or in January or February of 1934, that company had fallen into arrears in its royalties to the extent of, oh I don't recall, seventy-
 30(116) five to ninety thousand dollars, included in which total was about \$25,000 for the last twelve months in tonnage royalties.

The two landlords concluded after consulting the William-Ann Coal Company as to its future hopes and expectations that we could not allow the operating company to fall further into arrears, and therefore we must repossess the property. So in February, I believe, the two landlords under my supervision and direction and labor, made a common oral reentry into the leasehold, took possession of the leasehold; that reentry carried with it all permanent improvements, or in common parlance, fixtures; and we had the sheriff make a levy for the last year's taxes under the West Virginia law—not the last year's taxes but the last year's royalty, one year's royalty, and sold the movable property for that one year's delinquent royalty or rental, and the United Thacker Coal Company bought the movable property in for the amount of the year's back rental.

The improvements of a permanent nature which were fixtures were all on the fee lands owned by the United Thacker Coal Company and none on that owned by Cole & Crane, further than that some of the underground rail may have gone through some of the ownership of Cole & Crane. But the mining camp, tipples, side-tracks, out-buildings of every character, including supply houses,
 30(117) electric transformers, were all on the land owned in fee simple by the United Thacker Coal Company, which company today still owns those improvements.

In the late winter or early spring of 1934 Mr. Daniel Pritchard, who is known very casually to the United Thacker Coal Company as being the brother of the two Pritchard boys who had been operating unsuccessfully the William-Ann Coal Company, asked me if the United Thacker Coal Company would be interested in finding a lessee for the old William-Ann plant, and if so, if we

would give him an opportunity to find the lessee. I told him that we would, and he did.

Subsequently he came to me with the suggestion that he had found he hoped a lessee who would take the property over, who would be acceptable to the landowners, and that after a trip to Norfolk he would be prepared to divulge the name of the prospective lessee and the terms upon which he thought that prospect would lease the property. He returned subsequently, probably two weeks later, and stated that the Seaboard Airline Railway Company was the prospective lessee. I knew it was then in receivership. He stated they probably would not be acceptable, but on further reflection, which was almost immediately, I said they would probably be a very acceptable lessee as their monthly rentals would be taxed as court costs.

Out of that in the next two or three weeks grew what is filed as an exhibit here with your batch of papers. 30(118) Exhibit No. 2, a formal indenture lease between the United Thacker Coal Company and Cole & Crane, lessors, and the Receivers of the Seaboard Airline Railway Company. That indenture contains all of the conventional provisions of our standard form of lease.

Mr. COCKE. You mean the standard form of lease of United Thacker.

Mr. TYNES. Of the United Thacker Coal Company, which is not substantially different from the lease used universally in Southern West Virginia and Eastern Kentucky. By the terms of the lease, we look to the Receivers and the Receivers alone for the performance of the covenants of the lease. We look to no one else. We look to the Receivers for the minimum annual rental of \$16,800. We look to the Receivers for 9c per net ton royalty on all coal mined from the leasehold. These receivers are granted the exclusive right to enter upon and mine coal from the leasehold. These Receivers pay 100 percent of the land taxes assessed against the property in the name of the land owners. They have made all those payments to date direct to the land owners.

The tonnage royalties are provided to be paid monthly and they have been paid monthly. They have always mined in excess of the minimum requirements; therefore the Receivers have never paid any minimum annual rental as such since their tonnage multiplied by the 9c exceeds the minimum annual 30(119) rental of \$16,800.

The lease contains the usual provisions about keeping up the mines, about how the mines shall be laid out, about what section of the whole leasehold the operations shall be prosecuted

in; covenants with respect to all those provisions are covenants between the land owners and the Receivers. The land owners look to the receivers and to no one else for the fulfillment of all of the terms of that contract.

Of course, Mr. Plummer has already told you about the terms of the lease. It is for one year with the privilege of renewal from year to year for four additional years after July 1, 1935. The original term of the lease was fixed at fourteen months. Mr. Plummer has probably forgotten that that was what he at the time remembered as a little trading on the part of the land owner. The negotiations started back in April, they were not signed up, I finally wrote a letter in the first week of May that so far as the land owners were concerned, the lease must be made effective as of May 1, but since the landlord's leases generally in that territory bear the fiscal date of July 1, we would make the first period fourteen months and provide that all renewals should start July 1 with the rest of our leases in that territory. That is how that arose, and it was at the instance of the landlords and a matter in which Mr. Plummer 30(120) had to sort of ride along.

Article 17 of the lease, answering the question that the Examiner asked, or perhaps counsel for District Board No. 8, requires that the receivers make their election as to whether or not they will extend the lease for another year seventy-five days before July 1, which carries you back to April 14, 1936.

Mr. COCKE. I don't want to interrupt you, Mr. Tynes, if you want to continue on, but I would like to ask you a question.

Mr. TYNES. That is about the general picture I had in mind.

Mr. COCKE. Is there any understanding or agreement outside the terms of this written instrument varying from those of its provisions, I mean the lease agreement of the United Thacker Coal Company with the Seaboard Receivers whereby title to the coal is actually transferred to and vested in the Receivers?

Mr. TYNES. The entire understanding between the two landlords and the Receivers is contained in the formal indenture of lease dated May 1, '34, and the last extension, which bears the date of April 28, 1937.

Mr. COCKE. As I understand it, Mr. Pritchard has no contractual relationships with respect to the extraction of this coal, either directly or indirectly, with either of the land owners.

30(121) Mr. TYNES. None whatever with respect to the coal. The United Thacker Coal Company in its negotiations with the Seaboard agreed with the Seaboard that it would make available its equipment that it had taken over from the William-Ann Corporation, and that equipment it leases to Mr. Pritchard

as the so-called contractor or employee of the Seaboard and charges him a rental for it. With respect to the ownership of the land and the coal, those two landlords have no contractual relationship whatever with the contractor, Mr. Pritchard.

Mr. COCKE. Is it your understanding that the purpose and intent of this agreement was actually to vest the title of this coal in the Receivers?

Mr. TYNES. Whether it was the purpose and intent or not, as a lawyer it is my belief that it does.

Mr. COCKE. I think that is all. Have we developed all the answers to any questions that you had in your mind?

CROSS-EXAMINATION

The **EXAMINER.** I was interested in the ownership of the stock of the United Thacker Coal Corporation.

Mr. COCKE. Mr. Tynes can testify as to that.

Mr. TYNES. The controlling ownership is vested in, oh, I would say, three or four families that live in the East, and in myself. I suppose the whole list would not exceed 100. I am not familiar with it.

The **EXAMINER.** What is your capitalization?

Mr. TYNES. It is capitalized at the present time at 30(122) about \$4,000,000 with two reductions that have been made. The old certificates are still outstanding and they are stamped "Reduction in capital stock," and to save my life I can't tell you, but I would say that the capital stock at the present time is either two or two and a half million dollars.

The **EXAMINER.** Divided into 100 shares?

Mr. TYNES. They are \$100 certificates and they have been written down, and I think the last stamping on it is either \$50 or \$25 a share par value. It is stamped on the old certificates.

The **EXAMINER.** You testified as to Cole & Crane Company. Is that a corporation or Massachusetts trust, or either?

Mr. TYNES. That is a trust organized not under any law particularly. It was drafted in Huntington by Mr. C. W. Campbell and his co-trustees, one of whom is a lawyer. I don't like to speak for them. I can give you the general reputation with which I ought to be pretty well familiar, I think. Cole and Crane were two lumbermen who took up large bodies of land, cut the timber off, had the coal left, and during their lifetime constituted this trust known as Cole & Crane Real Estate Trust. Both of those gentlemen are dead, and the trust provides the lands shall be operated by the trustees, and no doubt provides how the 30(123) royalties and rentals and profits derived from the land shall be distributed. I am not familiar with that.

The EXAMINER. Are H. Langdon Laws, Albert H. Cole, and Charles W. Campbell the trustees of the Cole & Crane Company?

Mr. TYNES. They were to my knowledge the date that instrument was executed. Mr. Campbell has since died, and Mr. Charles Stevens, I think, is his successor.

The EXAMINER. I merely wanted that as a matter of information. I didn't understand just exactly the relation of the Cole & Crane trust.

Mr. TYNES. They were the trustees named in the trust.

Mr. COCKE. Has Seaboard Airline Railway Company, or the Receivers, so far as you know, or any officer or director of that company, any stock interest or other ownership, other than in the coal under these contracts, in United Thacker Coal Company, or so far as you know, in the trustee arrangement of Cole & Crane?

Mr. TYNES. I am sure that is true, and I think vice versa is also true.

The EXAMINER. Mr. Tynes, do you know the corporate existence with reference to the Dengiss Run Coal Company and the ownership of its stock?

Mr. TYNES. I just know in a general way, Mr. Examiner, sort of by hearsay and by living next to it, so to speak, that it is entirely a local corporation and probably confined to Huntington and Charleston, West Virginia.

The EXAMINER. You mean organized under the laws of the State of West Virginia?

Mr. TYNES. Its ownership is local, is what I mean, and I think it is organized under the laws of West Virginia. The papers here show that.

Mr. DELANEY. No; they do not, that is a peculiar thing. They state that it is a corporation.

Mr. TYNES. I think it is a West Virginia corporation. The stock ownership is very limited, perhaps in three families, so far as I know.

The EXAMINER. Can you tell me the amount of its capitalization?

Mr. TYNES. No; I cannot give you that.

The EXAMINER. Can you give the approximate capitalization?

Mr. TYNES. I don't believe so; no.

The EXAMINER. I would appreciate having a statement from you gentlemen representing the applicant, showing the corporate existence of the various corporations involved and their stock capitalization. That can be very easily gotten, can't it, from the records in West Virginia where they are West Virginia

corporations, and in Virginia where they are Virginia corporations?

30(125) Mr. COCKE. We will be glad to furnish that information in the extent to which it is shown by the public record, Mr. Examiner.

The EXAMINER. That is all that I would ask for right now, and it doesn't need to repeat what Mr. Plummer has testified to. Mainly I do want to know something about the Dingess Run Company and the Peerless Coal Company and those concerning which there has been no positive testimony as yet.

Mr. EASER. Mr. Tynes, you stated that prior to your leasing the William-Ann mine to the Receivers of the Seaboard Airline Railway Company it had been leased to the William-Ann Coal Company, is that right?

Mr. TYNES. Yes.

Mr. EASER. And the William-Ann Coal Company, was that a corporation?

Mr. TYNES. A corporation—a West Virginia corporation.

Mr. EASER. Do you know who the officers of that corporation were at that time?

Mr. TYNES. I believe the President was Mr. W. E. Pritchard.

Mr. EASER. Any other officer that you knew?

Mr. TYNES. The secretary and treasurer was a Mr. Baker, of Bramwell, West Virginia. I forget his initials.

Mr. EASER. On direct examination you mentioned a Daniel Pritchard. Was he connected with the William Ann
30(126) Coal Company?

Mr. TYNES. No; I stated I had not known Mr. Daniel Pritchard in connection with the William-Ann except in a most casual way, that I had known his two brothers, W. E. Pritchard and Bob Pritchard, in charge of the operations of the William-Ann. Mr. Dan Pritchard did not know until recently that he had any stock in it. I understand he did own a small amount of stock of the William-Ann Coal Company.

Mr. EASER. Did you know that he had anything to do with the operation of the William-Ann mine?

Mr. TYNES. I understood that he did not. I understood toward the last year or two of his life that he was selling the output of the William-Ann mine, selling the output as a coal sales agent for the company.

Mr. EASER. Did you know to whom the William-Ann Coal Company, through Mr. Daniel Pritchard, sold this coal in the latter two years of its existence?

Mr. TYNES. No; I don't know that at all. As landlords we do not follow up the coal.

Mr. EASLET. I didn't get it on direct examination. Pard n me if you have to repeat yourself. How long was this property leased to the William-Ann Coal Company?

Mr. TYNES. My recollection is that the lease was executed in '22 and they went out of business in '33 or January or February of '34.

30(127) Mr. EASLET. Then, as I understand it, Daniel Pritchard came to you and—

Mr. TYNES. Asked me if I would be interested in finding a lessee for that property.

Mr. EASLET. Did he state what his interests would be in endeavoring to find you a lessee for the mining property?

Mr. TYNES. I just supposed it was financial, that he was expecting to make something out of it. No; he didn't state what it would be. When he came to me later he told me that the lessee would be the Seaboard Receivers if agreeable to us and a plan could be worked out, and if he could make the arrangements that he would actually mine the coal for the Seaboard's account through some cost-plus arrangement, as he explained it to me at that time.

Mr. EASLET. Did you understand his explanation of his arrangement with the Receivers to be that of an employee?

Mr. TYNES. Are you asking me now as a lawyer?

Mr. EASLET. I ask you what actually transpired between you and Mr. Pritchard.

Mr. TYNES. As I understand the arrangement between the Receivers and Mr. Pritchard, Mr. Pritchard is a sort of glorified miner of the Receivers, or employee; yes. I don't see anything else to it.

Mr. EASLET. You stated that this lease which has been introduced here in evidence runs on a yearly basis with
30(128) the privilege of renewal for a period of five years, with a minimum and maximum amount of coal to be—

Mr. TYNES (interposing). No; they can mine as much as they please. We would like to see them mine it all next year. They have that privilege and we can't touch a ton of it.

Mr. EASLET. You do have a minimum amount that they can mine, is that right?

Mr. TYNES. No; they have to pay us \$16,800 whether they mine any. In other words, they could cancel on Mr. Pritchard tomorrow as their employee, or the day after they renew the contract with him, but nevertheless they have to pay us \$16,800 and they have to pay the next year's taxes.

Mr. EASLET. And what in addition to \$16,800 and the next year's taxes do they pay you? What is that based on?

Mr. TYNES. That is based upon their covenant that they will mine at least that number of tons, which when multiplied by 9c a ton will produce \$16,800. To the extent they fall short of that production they have to make up the amount, so that if they cancel on Mr. Pritchard the day after they have renewed the agreement with him, if they do not mine our coal and do not get someone else to mine it, we have our cake and eat it too to the extent of \$16,800, plus two or three thousand dollars in taxes. They pay us regardless.

Mr. EXNET. When would you say title to that coal passes; would it be in the mine or after it was mined in order 30(129) to pay you your royalty?

Mr. TYNES. Now you are getting into a legal discussion of the landlord in the State of West Virginia. If you want that answered, I can give it to you. The title passes at the time the lease is made under the West Virginia law. Until it is mined it is held as chattel real and may be levied upon and sold under execution—this is the only test the courts by the way have made—as personal property on two weeks' advertisement, whereas real estate as such may only be sold on four weeks' advertisement. I am answering your question in terms of decided cases. There is very little law on that question in West Virginia, as a matter of fact, but title to the property is in the Seaboard Receivers under the West Virginia law at the time they execute the lease—the title to the coal.

Mr. EXNET. The title wouldn't be after the coal is—

Mr. TYNES (interposing). The landlord has a reversionary interest.

Mr. EXNET. You stated that when you entered into the lease agreement with the Receivers of the Seaboard Airline Railway Company, you also entered into a lease agreement for the movable property to Daniel Pritchard.

Mr. TYNES. Daniel H. Pritchard; yes.

Mr. EXNET. What was that lease agreement?

30(130) Mr. TYNES. That lease gives him the right to use the equipment upon the payment to us of 2c per ton for each ton of coal that he mines with that equipment. It requires him to maintain that equipment at its then standard of repair and condition and to restore it to us at the termination of the lease in that same condition. It provides that any accretions that he makes to that equipment shall be the landlord's and not his, so that the plant will be kept up as a complete entity, with title in the landlord. It gives him an option at a stated price per year to buy that equipment if he wants it, and we have hopes that he would buy it but he has not bought it, so the title is still

in the landlord and he rents it from the landlord, United Thacker Coal Company.

Mr. EASSET. Do you have an inventory of that movable property?

Mr. TYNES. I have an inventory of all the property, and on or before the 20th day of January, I believe, of each year he is to furnish an inventory of the property, including any new items. I don't know that I have gotten that inventory.

Mr. EASSET. Do you have a copy of the last inventory?

Mr. TYNES. I don't think so. I don't think that we got one in January. As a matter of fact, I am not sure we have gotten any except the original one, because we have our own force 30(134) over there and our engineer keeps track of it and notes it in his notebook and has it in his records.

Mr. EASSET. Did you mention the movable property that is leased to Mr. Pritchard?

Mr. TYNES. All the mining cars, locomotives, cutting machines, tools, and miscellaneous equipment that we took over from the old William Ann at the constable sale. We lease him the tippie and the screens and all the miners' houses that we took over on a lease.

Mr. EASSET. Use of the side-tracks?

Mr. TYNES. There is some question as to whether the side-tracks are ours or Norfolk & Western's. We have not forced that issue. They have not either.

Mr. EASSET. Let me ask you this: Do you have a valuation on that movable property, a fixed valuation, of course subject to depreciation?

Mr. TYNES. We simply carried it on our books at the amount of one year's rental which we bid the property in for; purely a bookkeeping item and it is my recollection it is a little less or a little more than \$25,000; I am not sure.

Mr. EASSET. I don't understand what you mean. Is that the valuation of the movable property?

Mr. TYNES. The movable equipment was not attached to the fee-hold. Under the West Virginia law you can distrain for only one year's rent. Well, one year's rent amounted to 30(132) about \$25,000, so we bid that amount for this movable property and thereby cleared the books, and I think it is carried on the books of our company at that price.

Mr. EASSET. You still carry it at that price, you haven't changed the valuation?

Mr. TYNES. I don't keep the books. They are kept in New York, and I am not very familiar with them.

Mr. EANET. Do you know whether that valuation has been changed to more or less?

Mr. TYNES. I don't know at all. I am not sure whether I stated that he also pays the taxes upon these improvements, and I believe I stated that he keeps it insured for the benefit of the lessors as their interests appear and are.

Mr. EANET. For the benefit of whom?

Mr. TYNES. For the benefit of himself and the two lessors as their respective interests appear.

Mr. EANET. The Receivers of the Seaboard Airline are not covered therein.

Mr. TYNES. Not mentioned at all. They have nothing to do with it.

Mr. EANET. Do you know the amount paid to you under this lease by Daniel Pritchard for the last year?

Mr. TYNES. No; I do not have the figures.

Mr. EANET. Do you know approximately?

Mr. TYNES. I couldn't even give it to you approximately. Under the contract we give him as I recall it of the new units that he puts on, and then I didn't give you that qualification when I said we get title. The arrangement isn't quite that liberal to us. He gets credit on his rental up to a certain per centum of the new equipment he brings on the property, title of which immediately vests in us, then he has an option to buy the property back at stated prices, depending on the year.

Mr. EANET. You don't know offhand the amount he paid to you, less credit for new improvements, in 1936.

Mr. TYNES. I do not have that in my mind at all; no, sir.

Mr. EANET. You stated that there are tracks there about which there is a question of ownership, whether it is in the corporation or the Norfolk & Western.

Mr. TYNES. That question arises pretty generally down there, as to who owns the tracks.

Mr. EANET. Is the Norfolk & Western a subsidiary of the Seaboard?

Mr. TYNES. It is not; no.

Mr. EANET. Is it the direct tracks to the mine on which there is a question of ownership?

Mr. TYNES. No; just side-tracks under the tipple. Have you ever been to a coal mine? It is not a side-track running up to a mine. This mine is located on a branch line of the Norfolk & Western and it has two tracks that run around under a tipple, probably eight or nine hundred feet long, and I don't know to whom the rail on the tracks belongs, whether United Thacker Coal Company or Norfolk & Western.

The EXAMINER. I don't want to limit you in your examination, but we are getting rather far afield from the issues concerned in the application for exemption here.

Mr. EASEL. Do you lease any part of that property to anyone other than the Receivers of the Seaboard Airline Railway Company?

Mr. TYNES. Not that property. Four thousand acres Cole & Crane and our ownership is embraced entirely in the Seaboard lease. We have other leases in that territory, if that is what you mean.

Mr. EASEL. You own other land in adjoining territory?

Mr. TYNES. Oh, yes.

Mr. EASEL. And you lease that, too?

Mr. TYNES. Some of it is leased and some of it is not leased.

The EXAMINER. Does the Consumer's Counsel have any questions? Mr. Ansell?

Mr. ANSELL. I have just one or two, Mr. Examiner. Mr. Tynes, you stated that the form of lease originally entered into between United Thacker Coal Company and the Cole & Crane Trustees and the Receivers of the Seaboard Airline Railway Company was quite a conventional lease, is that true?

30(135) Mr. TYNES. No; I didn't say that, Mr. Ansell. I said that lease contained the conventional provisions of leases generally in that country, and that those provisions were our standard provisions.

Mr. ANSELL. Didn't it contain other provisions that were not so conventional?

Mr. TYNES. The only provisions or associated provisions that it contains that are not the same as our standard form of lease is a provision that I first described as being exceptional, namely, one year with the privilege or renewal for four additional years.

Mr. ANSELL. The provision for contingency of the Seaboard Airlines contract with Pritchard was not unconventional, was it?

Mr. TYNES. It was the first time I had ever run into it in twenty-seven years, so I had to work it out the best I could. It was conventional with me in the sense it was universal with me. It is the only case I have had.

Mr. ANSELL. I asked you whether it was conventional in West Virginia and Eastern Kentucky.

Mr. TYNES. I should say yes.

Mr. ANSELL. Conventional with you.

Mr. TYNES. Conventional in that sense. It was a different situation from almost any other.

Mr. ANSELL. Now was the provision which was contained in the supplemental indenture of April 14, 1936, whereby the Receivers of the Seaboard Airline and

United Thacker Coal Company and the Cole & Crane Trustees agreed to a renewal of the lease upon the terms stated in the original indenture, whereby the term of renewal was affected by a contingency of a decision of the United States Supreme Court, conventional in West Virginia and Eastern Kentucky?

Mr. TYNES. No; I don't think we have ever gone through but one period in which that would follow your description or your question.

Mr. ANSELL. That is the only case you know of?

Mr. TYNES. The only case I know of; yes. If you mean to ask me to give an opinion as to whether that was a motive or not, I don't know.

Mr. ANSELL. No; I didn't ask that.

Mr. TYNES. I don't mean to answer that.

Mr. ANSELL. Now what were the circumstances which induced United Thacker Company to enter into a renewal upon the terms of a contingency of a Supreme Court decision?

Mr. TYNES. I just stated to you that the United Thacker Coal Company entered into no arrangement upon any such contingency; that is what I was explaining to you.

Mr. ANSELL. You say no such agreement was made.

Mr. TYNES. No; we permitted an extension. We didn't have to permit it. We already had granted that right to 30(137) the Seaboard Receivers in our original lease of May 1, 1934. If they chose to extend it under its terms, we had no right to say they could not.

Mr. ANSELL. To extend it for a period of a few days.

Mr. TYNES. A period of a full year.

Mr. ANSELL. It was not for the period of a full year, was it?

Mr. TYNES. I don't know. If you show me the paper, I can answer it. I was away at that time and may be that is one reason it was done that way. I can't tell you about it; I was in South America.

Mr. ANSELL. You don't know anything about that one?

Mr. TYNES. All I know is what I have learned since I got into this, which is very little.

The EXAMINER. What lease are you testifying about now?

Mr. TYNES. One of these extensions.

The EXAMINER. Of what lease?

Mr. TYNES. Of the original lease.

The EXAMINER. Between the United Tracker and Receivers of the Seaboard Airline?

Mr. TYNES. Yes. I understood when I returned in May or June that the Seaboard had not yet definitely extended the lease.

and one reason why it had not been extended was because I was not there to look after it, and they no doubt had their own reasons for not extending it, and it was past the day of their election that they must make under the terms of the original lease, which was seventy-five days prior to July 1, 1936, for that year. This writing here as I understand it simply gives them an additional two weeks or four weeks or six weeks, or whatever time is specified in here, within which to make the election and still be within the provisions of paragraph 17 of their original lease. Otherwise, they might have been in default. I know very little about that. I was away, but I imagine they were not ready to decide to make the election and they asked the landlords to give them additional time. What their motives were I do not know. I was away.

Mr. ANSELL. And had you returned on June 19, 1936?

Mr. TYNES. I had returned on June 19, I am pretty sure.

Mr. ANSELL. They never did renew the conditions of the original lease, did they?

Mr. TYNES. No; they renewed on June 19 because I had gotten back from South America and found their former extension had expired on June 19 and they renewed on June 19 because I declined to give them a further extension. Why they hadn't renewed it earlier was a matter of their own business and their own knowledge.

Mr. ANSELL. Mr. Tynes, you undertook to explain why the term of the original lease was fourteen months, ending I believe June 30, 1935, or maybe July 1, 1935, I don't recall which. Can you tell us again why that was done?

Mr. TYNES. The negotiations stated in April. We had an idle mine on our hands and the Seaboard had not yet made up its mind when May 1 came around definitely as to whether they were going into this arrangement. We had other inquiries from time to time for property, you never know when one is going to turn out to be a serious one, so we insisted that some writing be executed between the Seaboard Receivers and our company binding them to take this property or else drop the negotiations. As I recall it, I do not have it here but I think my memory is very clear on it, about the fifth or eighth of May I wrote them and told them to fish or cut bait, and they wrote back and said, "Deem us as being committed," and I replied, "All right, as of May 1," to get that little additional time. I think I pleaded previous engagements and then on my part delayed the execution of the lease until I could write it up. The rest of our leases are on a calendar year basis, January 1 to July 1. I suggested this be put on the same basis but that the lease be back-dated to May

1 which represented the date as of which I insisted it should be effective.

Mr. ANSELL. You said most of your leases were January 1 to July 1.

Mr. TYNES I have forgotten the anniversary, but all 30(140) the leases provide for the payment of a minimum royalty annually to make up the deficit, but most of our leases provide for the payment of tonnage royalties quarterly, on the twenty-fifth day of the month following the quarter in which they were earned. In this particular case dealing with the Receivers I wanted to keep in step with the orders allowing the court cost and I put that on a monthly basis.

Mr. COCKE. You mean operating expenses of the receivership?

Mr. TYNES. Yes; operating expenses of the receivership, that I was calling the court cost. They had to be paid first.

Mr. ANSELL. I still can't understand, Mr. Tynes, what your reason was for entering into this lease to terminate on July 1 or June 30, 1935.

Mr. TYNES. What is it you want to know about it?

Mr. ANSELL. I want to know what induced you to pick June 30.

Mr. TYNES. To suit my own convenience solely. I didn't consult anybody on that as I recall.

Mr. ANSELL. Is that because other leases terminated on that date?

Mr. TYNES. I am not sure; I made that remark but I am not sure whether they did or not. We have a bunch of leases. I certainly wanted it the first of the month, I didn't want it the mid-30(141) dle of the month, and the lease was not executed as a matter of fact until up in July, the 13th or 14th.

Mr. ANSELL. It could have been the 1st of June as well as the 1st of July, couldn't it—the termination date?

Mr. TYNES. Yes; that might have been just as well.

Mr. ANSELL. Then you have no reason particularly for picking June 30 or July 1?

Mr. TYNES. None in the world except that was the date that I figured the lease was going to be executed. Perhaps I concluded it wouldn't be closed before July 1. There was no motive whatsoever on the part of the land owners in selecting July 1 over June 1.

Mr. COCKE. Mr. Tynes, there is a provision, is there not, in the existing instrument or lease from the two owners of the property to the Receivers of the Seaboard providing that the land owners or the lessors in effect agree to make available to Mr. Pritchard, Daniel H. Pritchard, the Seaboard's employee or contractor, the mine equipment which you testified about?

Mr. TYNES. There is a provision in the lease between the landlord and the Seaboard Receivers; yes.

Mr. HARRINGTON. Mr. Tynes, is there a written agreement between you and Mr. Pritchard with reference to leasing the improvements?

30(142) **Mr. TYNES.** Yes.

Mr. HARRINGTON. Have you got a copy of that? I don't have a full copy; I have a partial copy.

(Arrangements were made to permit Mr. Harrington to have a copy of the lease over night.)

Mr. HARRINGTON. Mr. Tynes, your lease with Mr. Prichard is based on the amount of coal produced at the mine at so much per ton?

Mr. TYNES. Two cents a ton.

Mr. HARRINGTON. Payable to you as compensation for the use of the property?

Mr. TYNES. That is right.

Mr. HARRINGTON. And Mr. Prichard is actually the producer on the property of the coal—he is producing the coal?

Mr. TYNES. Producing the coal for who?

Mr. HARRINGTON. I am not saying who he is producing it for.

Mr. TYNES. He is doing the labor of getting the coal out of the solid and on to the railroad.

The EXAMINER. Is he operating the mine for the purpose of mining and extracting coal?

Mr. TYNES. He is the fellow who is actually doing the extracting of the coal and loading it on the cars.

Mr. HARRINGTON. Without this lease of the improvements he would be unable to produce the coal?

30(143) **Mr. TYNES.** Unless he supplied some of his own; yes.

Mr. HARRINGTON. The railroad company has no control over these improvements?

Mr. TYNES. None whatever. It has nothing to do with them further than to see to it that we of course carry out our obligation to them, that we make them available to them for their independent contractor.

Mr. HARRINGTON. These improvements are not mentioned in the lease with the railroad company?

Mr. TYNES. Not leased to the Receivers at all. They are referred to in the lease and the first page or two of the lease speaks of the fact that they are entering into a contract with others to mine this coal for their account, in which event the landlord binds himself to make this equipment available to the contractor. The agreement does not say at what price. That is left to the landowner and the contractor.

The EXAMINER: Mr. Cocke and Mr. Plummer, do your exhibits as introduced show a copy of the contract between the Applicant and Mr. Pritchard?

Mr. COCKE. Oh, yes.

REDIRECT EXAMINATION

Mr. COCKE. One more question, Mr. Tynes. Mr. Harrington asked you a question as to the basis on which Mr. Pritchard paid for the use of the equipment, namely, I think you said 30(144) two cents a ton for all coal actually extracted from the mine. The more coal that is mined, the more wear and tear on the equipment, isn't that true?

Mr. TYNES. That is true; yes. The more coal that is mined, the greater revenue to the landowner, too.

Mr. COCKE. In other words, the use of the equipment was placed on a basis proportionate to the amount of use?

Mr. TYNES. That's right.

Mr. COCKE. And that was a convenient method of arriving at that result?

Mr. TYNES. That is a conventional way of fixing it.

Mr. COCKE. That is a conventional way of doing it in a mining territory?

Mr. TYNES. That's right. I might say the price was a little low, because we were stuck in the depression in 1934 and we had an idle mine on our hands, and had it before, and knew how many thousand dollars a month it cost to have a mine idle around there—what happens to the equipment.

The EXAMINER. Mr. Tynes, how many mines do the United Thacker Coal Company own?

Mr. TYNES. That is six, I believe, now.

The EXAMINER. And how many of those does it operate?

Mr. TYNES. None. It doesn't operate at all.

The EXAMINER. It is not an operating company?

Mr. TYNES. It operates only during such period as it may have to repossess a mine and have it left on its hands and finds the losses are less to operate than to let the 30(145) mines fill up with water and deteriorate. It finds a lessee and gets it on whatever terms it can, you know, and this was in the very worst of the depression here when we worked this out.

The EXAMINER. Are all of the mines owned by the United Thacker located in the State of West Virginia?

Mr. TYNES. West Virginia exclusively; yes.

The EXAMINER. And how many? Four, I understand, are leased to corporations other than the Seaboard Airline. Is that correct?

Mr. TYNES. That is right.

The EXAMINER. Would you mind naming the lessees of the mines?

Mr. TYNES. Puritan Coal Company, Landstreet Downey Coal Company, Turner Coal Company, New Century Coal Company, a lease to Sycamore Coal Company—part of the coal leasehold from us (they have three or four ownerships), Crystal Block Mining Company, and the little mine on the main line of the Norfolk & Western, an isolated tract of a hundred and some acres, operating off and on as far back as 1900, to the Alma Fuel Coal Company, I believe it is called now.

The EXAMINER. And are these mines what is generally known as commercial mines, or are they railroad mines?

Mr. TYNES. Commercial mines, all of them.

The EXAMINER. Thank you. Are there any further questions?

Mr. TYNES. Mr. Ansell, I do recall, I think, very 30(146) definitely why July 1 was selected. My first impression was correct and then I decided I was wrong. It was a matter of trading between Mr. Plummer and me. The lease provides for a minimum royalty of \$16,800. Mr. Plummer wanted me to make that lease for the first year. He knew he wanted the property for one year, and didn't know whether he wanted it for next year. I wanted to get the full \$16,800 for whatever period I made him sign up for. His argument was, "You can't take an old run-down mine and get your production up in less than sixty days," and I said, "Start on July 1 and from that date on the \$16,800 is being reckoned." That is what that was based on.

CROSS EXAMINATION

Mr. MEANY. Mr. Tynes, could you tell me whether the United Thacker has at all times a representative on those properties?

Mr. TYNES. Not twenty-four hours a day; no. We have a man who goes down there practically every week. Sometimes he stays one day, sometimes six.

Mr. MEANY. Production is checked in what manner?

Mr. TYNES. He checks the production constantly, continuously. We get in some instances the weights from the Norfolk & Western direct. In other instances through the operating company, who in turn receives the weights direct from the Norfolk & Western. In one or two instances the tonnage is 30(147) calculated on the cubical content basis—measure the number of cubic feet and measure by the specific gravity and arrive at the tonnage of coal, and pay for it even though the railroad weights may be far short of that.

Mr. MEANY. Has there been any dispute as to the question of tonnage extracted from the mine since this lease has been in effect?

Mr. TYNES. This particular mine? No; none that I recall.

Mr. MEANY. On the question of contractor's liability for any damage to the equipment which is leased to you, has there been any question of damage?

Mr. TYNES. Not at all. The accretions to the equipment exceeded any damage, so pay no attention to it.

Mr. MEANY. Do you look to Mr. Pritchard directly in connection with terms of the contract for reimbursement under the contract?

Mr. TYNES. For damage.

Mr. MEANY. You look to him directly?

Mr. TYNES. Look to him directly.

Mr. MEANY. You wouldn't consider the Seaboard in any sense, in view of the contention that he is more or less their agent, as surety for any claim they might have against Mr. Pritchard?

Mr. TYNES. We look to Mr. Pritchard exclusively, as I say, with respect to the equipment; to the Receivers of the 30(148) railroad exclusively with respect to the operating provisions of the coal lease. If Mr. Pritchard, their agent, conducts his operations in our land in such a way as to lose 100 acres of coal, we do not look to Mr. Pritchard, we look to the Receivers of the Seaboard Airline Railway Company. If they lose stumps, look to the Receivers, not Pritchard.

Mr. MEANY. In the event such a dispute did occur and you looked to the Seaboard and they refused, would that have any effect whatsoever on the renewal of your lease with the Seaboard?

Mr. TYNES. Well, it might have the same effect as it would put any ordinary situation in which you are a lessee disregarding the terms of covenant of your lease.

Mr. MEANY. Then you would look to Seaboard as surety?

Mr. TYNES. If you talk to us about renewal, except the Seaboard by Article 17 of the lease has the right to renew, only look to them for damages for breach of the contract.

Mr. MEANY. In other words, then, in the final analysis the Seaboard Airline Railway, or the Receivers of the Railway, would be held by you to be responsible for Mr. Pritchard's failure to make good any damage.

Mr. TYNES. We don't look to Mr. Pritchard at all with respect to the real estate. We look to the Receivers. Our contract is with the Receivers. Mr. Pritchard hasn't a thing to do 30(149) with it. If coal is lost or the mine is damaged through

their agent, if you want to call Mr. Pritchard an agent—through his activity—we look to the Receivers. Now, if Mr. Pritchard, with whom we have dealt, destroys one of our mining machines and doesn't repair it, we look to him.

The EXAMINER. Are there any further questions of Mr. Tynes? Mr. Tynes, will you give Mr. Harrington the copy of the lease? I can assure you it will be returned in just the same shape that you release it.

The witness is excused.

J. J. KELLY, Jr., called as a witness for and on behalf of the Applicant, was duly sworn and testified as follows:

DIRECT EXAMINATION

Mr. PLUMMER. State your name, address, and business affiliation.

Mr. KELLY. J. J. Kelly, Jr., Wise County, Pigstone Gap, Treasurer of the Glamorgan Coal Land Company, primarily a superintendent of saloons of Wise County and layman in the coal business.

Mr. PLUMMER. Mr. Kelly, are you familiar with the instrument of conveyance from the Glamorgan Coal Land Company to the Seaboard Receivers and the contracts which have continued in force since 1934 and are now in effect?

Mr. KELLY. I have been familiar with those but I have not referred to those since the time of execution in 1934 for the purpose of this hearing today.

30(150) Mr. PLUMMER. Can you state whether the intent and purpose of those agreements was to convey to the Receivers of the Seaboard Airline Railway Company the title to the coal of Glamorgan Coal Lands, with the exclusive right to extract and mine that coal?

Mr. KELLY. It was.

Mr. PLUMMER. Under the terms of that arrangement, Mr. Kelly, how are the royalty payments made?

Mr. KELLY. The royalty payments are made mostly to the Shenandoah Life Insurance Company of Roanoke, Virginia, on assignment from the Glamorgan Coal Lands Corporation, which has a loan now outstanding with the Shenandoah Life Insurance Company.

Mr. PLUMMER. In other words, the payments made to the Shenandoah Life Insurance Company are an assignment of the royalties by the land owners, which assignment has been accepted by the Seaboard Receivers. Is that correct?

Mr. KELLY. Yes, sir.

Mr. PLUMMER. Mr. Kelly, who owns the mining equipment, machinery, and so forth, of the Glamorgan Mine at the present time?

Mr. KELLY. At the sale of the properties of Glamorgan Coals, held last month, Mr. W. C. Shunk, representing the Peerless Coal Corporation, purchased the contracts with the Seaboard 30(151) which were then placed on sale. The Glamorgan Land

Corporation purchased the real estate and all other properties of the Glamorgan Coals, and it today owns title for all of that property. There was an understanding with the Peerless Coal Corporation that the mining equipment would be sold to them at the purchase price on a four and one-half cents per ton payment until this equipment was paid for.

Mr. PLUMMER. And that agreed sale is under what you might term a conditional sales agreement?

Mr. KELLY. A conditional sales agreement which has not been formally executed, but there is an oral agreement to that effect.

Mr. PLUMMER. Mr. Kelly, does the Glamorgan Coal Corporation own any stock in the Peerless Coal Corporation?

Mr. KELLY. The Glamorgan owns no stock in any other corporation.

Mr. PLUMMER. It has no interest?

Mr. KELLY. It has no interest in any other.

Mr. PLUMMER. Who owns the capital stock of the Glamorgan Coal Land Corporation?

Mr. KELLY. The Glamorgan Coal Lands Corporation stock is owned by the families of two individuals, the first was that of my father and the second was that of his partner, O. M. Vickers, of Wise, Virginia.

Mr. PLUMMER. Can you state positively of your own knowledge that the Seaboard Airline Railway Company or its 30(152) Receiverships has no stock ownership or any representation on the Board of Directors of the Glamorgan Coals Corporation?

Mr. KELLY. The Seaboard Airline Company and no other corporation has any stock of the Glamorgan Coal Corporation and has nothing to do with the affairs of the corporation.

Mr. PLUMMER. Can you state, Mr. Kelly, whether or not it was the purpose and intent of this indenture of lease from the Glamorgan Coal Land Corporation to the Receivers to transfer and vest in the Seaboard Receivers the title to the coal produced in this mine?

Mr. KELLY. It was our understanding that according to the terms of the lease, the way in which I interpreted them at the time the lease was executed, that the title to the coal should accrue to the Seaboard Airline Railway.

Mr. PLUMMER. Should vest in the Seaboard Airline Railway Receivers?

Mr. KELLY. Yes.

The EXAMINER. Do you mean by that to such coal as might be mined during the term of the lease?

Mr. KELLY. During the term of their lease; yes.

The EXAMINER. Certainly not to all the coal lands of the Glamorgan Coal Land Corporation.

Mr. KELLY. All of those lands, some 6,000 acres in 30(153) coal rights, 3,000 of which is in fee, were available to them if they wished to mine over the entire territory during the term of their lease.

Mr. PLUMMER. Mr. Kelly, I don't know whether you recall the provisions of the lease, but it speaks for itself. My recollection is that the Seaboard Receivers have the right, the unlimited right, to mine this coal in unlimited quantities. There isn't any restriction to the amount of coal the Receivers have a right to take from the mine.

Mr. KELLY. No; there is no restriction to it at all.

(Whereupon a recess of five minutes was taken.)

CROSS EXAMINATION

Mr. HARRINGTON. Mr. Kelly, what officer are you in the Glamorgan Coal Land Company?

Mr. KELLY. I am Treasurer.

Mr. HARRINGTON. Were you an officer of the Glamorgan Coals, Inc.?

Mr. KELLY. I had nothing to do with Glamorgan Coals, Inc. This was absolutely independent of the Glamorgan Coals, Inc., corporation.

Mr. HARRINGTON. It didn't have any interlocking directors?

Mr. KELLY. None whatever. The Glamorgan Coal Land Company refrained from having any interest in the operating whatever. It is simply a land holding and leasing company.

30(154) Mr. HARRINGTON. You don't operate any coal mines at all?

Mr. KELLY. No; we do not.

Mr. HARRINGTON. And you didn't have any interest in the mining equipment?

Mr. KELLY. No interest in the old Glamorgan Coals, no.

Mr. HARRINGTON. Is the Peerless Coal Company composed of the same members as the Glamorgan Coals, Inc.?

MR. KELLY. So far as I know there is no one connected with the Peerless Coal Company who was connected with the Glamorgan Coals.

MR. PLUMMER. I will state, Mr. Harrington, for your information, that that is entirely correct.

MR. HARRINGTON. In the lease with the receivers of your property, payment is based strictly on a royalty basis. Is that correct?

MR. KELLY. There is a minimum. I don't recall what that minimum is. It is on a royalty basis of four and one-half cents per ton, but I don't recall the minimum. There is no maximum as to the amount that can be mined in any one year.

MR. HARRINGTON. Do you know what the full price of the conditional sales contract made by the Peerless Company was in that court sale of the Glamorgan Coals, Inc., property?

30(155) **MR. KELLY.** I don't recall the exact figure at this time, but Glamorgan Coal Land Company have invested in the equipment and in the purchase of receivers' certificates of the old receivers, and in the payment of taxes, probably \$33,000 or \$34,000.

MR. HARRINGTON. Glamorgan Coal Land Company bought it in at the court sale?

MR. KELLY. At the court sale; yes.

MR. HARRINGTON. And then made a contract to sell it to the Peerless Coal Corporation?

MR. KELLY. Yes.

MR. EANET. And the purchase price was the purchase price of the Glamorgan people at the sheriff's sale, is that correct?

MR. KELLY. At the sheriff's sale the Glamorgan Land Corporation purchased these assets of the Glamorgan Coals at \$37,800 bid, and in that bid and in the assets of the old Glamorgan Coals was included some real estate as well as this mining equipment. This real estate the Glamorgan Land Corporation retains title to, but the equipment will be sold to the new operating company at a price of approximately \$33,000.

MR. EANET. And payment on that is to be based on four and one-half cents a ton?

MR. KELLY. Until it is paid for, and then it becomes his property.

30(156) **MR. EANET.** Is that subject to any other agreement or condition?

MR. KELLY. Which is that?

MR. EANET. The purchase of this equipment.

MR. KELLY. As I told you at the beginning, the purchase of this equipment has not been entered into in writing but it is only oral at this time.

Mr. PLUMMER, Glamorgan Coal Land Corporation purchased all those properties and assets except the real estate, property and interest of the Glamorgan Coals, Inc., or receivers under the contract of the Seaboard Receivers. Is that correct?

Mr. KELLY. And the Glamorgan leasehold.

Mr. EASEY. And can you state, with your knowledge of the transaction, whether the rights of the Glamorgan Coals and the receivers under this purchase were purchased by the Peerless Coal Company?

Mr. KELLY. They were.

The EXAMINER. Mr. Eichelberger, Consumers Counsel, have you any questions?

Mr. EICHELBERGER. No questions.

The EXAMINER. Mr. Ansell?

Mr. ANSELL. No questions.

The EXAMINER. Mr. Kelly, is the Glamorgan Coal (30-157) Land Company a West Virginia Corporation?

Mr. KELLY. It is chartered under the laws of Virginia.

The EXAMINER. The witness is excused.

WALTER C. SHUNK, called as a witness for and on behalf of the Applicant, was duly sworn and testified as follows:

DIRECT EXAMINATION

Mr. PLUMMER. Mr. Shunk, your name is Walter C. Shunk and you are a resident of Bluefield, West Virginia?

Mr. SHUNK. That is right.

Mr. PLUMMER. Would you please state your relationship to the Peerless Coal Corporation?

Mr. SHUNK. I am President of the Peerless Coal Corporation and General Manager and Treasurer.

Mr. PLUMMER. Who owns the stock of the Peerless Coal Corporation, Mr. Shunk?

Mr. SHUNK. It is owned by the company and I subscribed for 500 shares. There are 1,000 shares at \$100 par.

Mr. PLUMMER. Do you know of your own knowledge that neither the Receiver of Seaboard Airline Company nor the Seaboard Airline Railway Company corporation have any stock, interest, or control of the Peerless Coal Corporation, have any representation on its Board or in its officers?

Mr. SHUNK. None whatever.

Mr. PLUMMER. Mr. Shunk, you are also one of the coreceivers of the Glamorgan Coals, Inc.?

Mr. SHUNK. Yes.

30(158) Mr. PLUMMER. It is a fact, is it not, that a decree was entered in the Circuit Court of Wise County authorizing and directing the Glamorgan receivers to adopt and carry out and perform the contract between the Glamorgan Coals, Inc., and Seaboard Receivers?

Mr. SHUNK. That is right.

Mr. PLUMMER. During the existence of that receivership that contract was carried out or performed by the Glamorgan Coals, Inc., receivers, was it not?

Mr. SHUNK. Yes.

Mr. PLUMMER. That contract was sold, or the right, title and interest of the Glamorgan Coals, Inc., and of its receivers, was it not, separately from the other property at the judicial sale of the property and assets of the Glamorgan Coal properties?

Mr. EANET. I would like to have the witness answer the question rather than have the question answered by Mr. Plummer in his question.

The EXAMINER. It is a decree entered in record in West Virginia. You are not objecting to the introduction of the testimony but to the form of the question. I believe we will get along just a little faster if we permit leading questions on this, if you don't mind, and then, when it comes to a controversial issue, I will be glad to listen to your objections on that.

30(159) Mr. COCKE. As a matter of fact, all of this is repetition anyhow.

Mr. PLUMMER. Mr. Shunk, on what basis is the Peerless Coal Corporation compensated for the work and service that it performs for the Seaboard Receivers under its contract?

Mr. SHUNK. On a flat price basis per ton.

Mr. PLUMMER. I have no further questions.

Mr. HARRINGTON. Will you read that last question?

(The stenographer read the last question.)

Mr. PLUMMER. Mr. Shunk, can you state whether or not the Peerless Coal Corporation has any title or any interest in the coal which it is producing for the account of Receivers at this Glamorgan mine?

Mr. SHUNK. No, we have no interest whatsoever.

Mr. PLUMMER. That is all.

CROSS-EXAMINATION

Mr. EANET. I understood you to say, Mr. Shunk, that prior to the Peerless Coal Corporation taking over the contract to produce, mine, prepare, manufacture, and ship the coal in the Glamorgan mine you acted as Receiver.

Mr. SHUNK. Co-receiver. There were two receivers. I was one of the two receivers; yes.

Mr. EANET. How long were you receiver?

Mr. SHUNK. From February 12. The Receivers haven't been discharged as yet. By court decree the operation and 30(160) managing of the property was turned over on the first of this month to the new company, the court giving the Receivers a reasonable length of time to wind up their affairs and report to the court. That we expect to do next week.

Mr. EANET. Can you state the number of tons that, as a Receiver, you produced during the period of your receivership?

The EXAMINER. You mean prior to the contract with the Seaboard Airline?

Mr. EANET. Prior to the contract of the Peerless with the Seaboard Airline. They took over from Glamorgan, as I understand it, as receivers.

The EXAMINER. As of what period is your question addressed?

Mr. EANET. From the time of their receivership to September 1.

Mr. SHUNK. That would be as of January 15 to September 1, 1937. That is the period of the receivership. It would be approximately 80,000 tons of coal, in round figures, during the period of the receivership involved.

Mr. EANET. And do you recall the basic price per ton that was agreed upon under the Glamorgan contract that you took over as Receiver?

Mr. SHUNK. That varied, Mr. Eanet. It began, as I recall, at \$1.62. I am not sure of that figure. Then allowances 30(161) were made by the railway receivers for additions to that price. At the end of the receivership that price was in the neighborhood of \$1.80.

Mr. EANET. Mr. Shunk, how were the Receivers paid for the coal mined?

Mr. SHUNK. You mean, in what manner were they paid, how often were they paid?

Mr. EANET. That's right—how often?

Mr. SHUNK. They were paid by check each week for the coal shipped during the preceding week.

Mr. EANET. How was your accounting with reference to the shipment of coal as mined by you under the contract to the Receivers? When did you start to bill them, or what were the accounting proceedings?

The EXAMINER. You are going to be a little bit mixed or confused because of the two receivers. Refer to the Railway Receivers as the Seaboard Airline, and the other, if you want to

call them receivers. Otherwise I am going to have trouble in knowing what your question was directed to, which receivership.

Mr. EANET. To the Glamorgan receivership.

Mr. SHUNK. That was determined from Monday to Friday work days of each week, and by railway car weights, and we received the railroad car weights for the coal that was mined. For instance, this week we billed the railroad receivers and then received the check for that about the end of the following week.

30(162) Mr. EANET. From whom do you receive those railway weights?

Mr. SHUNK. Do you mean the official of the railroad company?

Mr. EANET. At what point do you receive them? Can you state where those weights are arrived at?

Mr. SHUNK. Those weights are determined at the weighing station of the Interstate Railway at Andover.

Mr. EANET. Andover, Virginia?

Mr. SHUNK. Yes; Andover, Virginia.

Mr. EANET. And how far is that away from your mine?

Mr. SHUNK. I beg your pardon, those are Norton weights. I am not sure of that.

Mr. EANET. I didn't get that. They are what kind of weights?

Mr. EANET. I am not sure whether Norton or Andover. It wouldn't be Andover because they wouldn't haul the coal down there. That must be some interconnecting line between Glamorgan and the delivery point to the Seaboard Airline. Is there an Interstate weighing station at Norton—do you know, Mr. Gaudin?

Mr. KELLY. Yes; there is a weighing station at Norton.

The EXAMINER. The weights are determined either
30(163) at Norton or Andover.

Mr. EANET. And that is in Virginia?

Mr. SHUNK. I am quite sure that wouldn't be Andover, because on second thought that would be a back haul. They would have to haul it ten miles down and ten back to Norton.

Mr. EANET. This coal, then, when it leaves the mine—is it in the coal cars of the Receivers of the Seaboard?

Mr. SHUNK. The preponderance of coal loaded there is in Seaboard Airline equipment. When there is a shortage of that equipment it is usually loaded in Interstate Railway equipment, but a very small portion of it goes into foreign equipment, that is, equipment other than Seaboard Airline cars.

Mr. EANET. At what point does your responsibility as Receiver for the mining and production and manufacturing and shipping

of that coal cease? Is it at the mine or is it at the weighing station after the coal is weighed?

Mr. SHUNK. My understanding is that our responsibility ceases when we dump the coal into the railroad car, when the railroad car is loaded, so far as the responsibility of producing the coal for the railroad receivers is concerned.

Mr. EANET. Can you tell us, Mr. Shunk, when the Peerless Coal Company took over the contract of the Receivers? Did they take over the same terms and conditions that you 30(164) as Receiver had been operating under?

Mr. SHUNK. September 1, 1937.

Mr. EANET. Were there any changes in the operation by the Peerless Coal Company over the operation that had been conducted by you as receiver of the Glamorgan Coals, Inc.?

Mr. SHUNK. So far as the contract is concerned with the railway receivers, there were some modifications in the new contract over the old one.

Mr. EANET. What were those modifications?

Mr. SHUNK. I don't know that I could recite all of them now.

Mr. EANET. Were they modifications that changed the character of the previous contract?

Mr. SHUNK. There was some little change in the price. Otherwise the contract is pretty much the same. I imagine, Mr. Eanet, it would be necessary to compare the two contracts to get all of the changes. There were some changes in phraseology. I don't know as there were any real changes in the construction of it.

Mr. EANET. I agree with the witness. That is the way to get at the changes.

The RECEIVER. Have those things changed in any way 30(165) the transactions between the coal mine, the operator, and the receivers?

Mr. SHUNK. No; except, Mr. Examiner, that the old contract, as I recall as receiver for Glamorgan Coals, was based on a base price plus so much per ton to the contractor. That has been changed to a flat price to the contractor. Another change of some significance, Mr. Eanet, is the tonnage which the new company is contracting for.

The EXAMINER. Mr. Shunk, I understand now that the contracts that you are speaking of now are in evidence, aren't they—or are they?

Mr. SHUNK. Yes; they are.

The EXAMINER. Mr. Eanet, if you adjourn now it will give you an opportunity to familiarize yourself with the contracts and then, if you would resume in the morning, would that be satisfactory with you?

Mr. PLUMMER. I wonder if I might be permitted to ask this witness one more question. It might clear what this gentleman intended by his question. I want to ask Mr. Shunk this question: Mr. Shunk, will you state whether or not it is a fact that the contract which has been acquired, or the contract rights purchased, by the Peerless Coal Corporation is identically the same contract, containing identically the same provisions as 30(166) the receivers of Glamorgan Coals, Inc., were directed and decreed by the receivership court to adopt and continue to perform?

Mr. SHUNK. That is the same.

Mr. PLUMMER. In other words, let me put it this way: Is it not a fact that attached to the decree of the Circuit Court of Wise County directing the Receivers to adopt the contract was a statement marked "Exhibit A" showing the terms and provisions of the contract as adopted by the Glamorgan Receivers?

Mr. SHUNK. That is right.

Mr. PLUMMER. In other words, the contract which you have contracted, which the Peerless Coal Corporation has executed, is identically the same statement marked "Exhibit A" as attached, which sets forth the same terms and conditions?

Mr. SHUNK. That is right.

Mr. PLUMMER. In other words, the contract which the Peerless Coal Corporation has assumed and agreed to perform is identically the same contract that was in existence with the Glamorgan Coals receivers in its terms and provisions.

Mr. SHUNK. That is right.

Mr. EXNET. Haven't you testified—

Mr. SHUNK. I thought you had reference to the old contract.

Mr. EXNET. I had reference to the Peerless Coal 30(167) Corporation contract and the contract you had as a receiver.

Mr. SHUNK. That is the same. I thought you had reference to the old contract. It is my understanding that you had reference to the contract under which the receivers first started to produce coal for the railroad receivers.

Mr. EXNET. No; I only went back as far as the receivers acting for the Glamorgan Coals, Inc., and my purpose in asking that question was to tie up your management and supervision in the production, shipping, and manufacturing of that coal, being the same as you now are doing as a responsible officer of the Peerless Coal Corporation.

Mr. SHUNK. That's right.

The EXAMINER. We will adjourn subject to reconvening in this room tomorrow at ten o'clock.

(Whereupon, at 5:00 p. m., the hearing adjourned to reconvene the following day at 10:00 a. m.)

30(167½) [Reporters' certificates to foregoing transcript omitted in printing.]

30(167-a) Before National Bituminous Coal Commission

Thursday, September 23, 1937

A hearing on petition for exemption under sections 4 and 4 (a) of the National Bituminous Coal Act, by the Receivers of the Seaboard Airline Railway Company (Docket No. 49-FD) was held at 10:00 o'clock a. m., Thursday, September 23, 1937, in the Rose Room of the Washington Hotel, Washington, D. C.

Examiner: Tilman D. Cantrell.

Present for the Commission: Legal Division: Leo W. Harrington, Carl D. Sneed. Marketing Division: E. S. Meany. Consumers' Counsel: Wm. S. Eichelberger.

Appearances

W. R. Cocke, Counsel for the Applicant. L. B. Plummer, general attorney for the Applicant. W. H. Delaney, Attorney for the Applicant. B. T. Ansell, Counsel for District Board No. 8, in opposition to the application.

30(168) Thursday, September 23, 1937

Pursuant to adjournment the hearing in the above-entitled cause was resumed in the hearing room of the Commission in the Hotel Washington, Washington, D. C., at 10 o'clock a. m.

REDIRECT EXAMINATION

MR. COCKE. Mr. Tynes, you recall that during your examination yesterday the Examiner asked you some questions regarding the ownership of the stock and the present capitalization of the United Thacker Coal Company.

MR. TYNES. Yes, sir.

MR. COCKE. Since then have you had an opportunity to refresh your recollection so that you are able to give those facts in greater accuracy and detail?

MR. TYNES. Yes, sir; I have.

MR. COCKE. Will you please state what they are?

MR. TYNES. I find that following the sale of the greater portion of the company's coal properties to the U. S. Steel Corpora-

tion the capital stock was reduced from \$4,000,000, formerly represented by 40,000 shares of \$100 par value, by reducing the par value of the stock to a total of \$25 per share; that there is now outstanding a few shares less than 40,000 shares, which would make \$1,000,000 capital stock. Whether the authorized

capital is a little over a million or just a million I don't recall. With regard to the ownership, as I said yesterday the control of the company is in the hands of Delancey Kountze, and his sister, of New York City; of the estate of R. T. W. Duke, Jr., of Charlottesville, Virginia; and of J. F. Slaughter, of Lynchburg and Richmond, I believe, Virginia; and I am one of the larger stockholders personally.

Mr. COCKE. R. T. W. Duke was a lawyer in Charlottesville?

Mr. TYNES. A very prominent lawyer, now dead.

Mr. COCKE. No relationship with the North Carolina tribe?

Mr. TYNES. None what'er.

Mr. COCKE. I think that is all.

The EXAMINER. Is there any further cross-examination?

CROSS-EXAMINATION

Mr. EANET. Mr. Tynes, if I understood you correctly, you stated on direct examination yesterday that the William-Anne mine properties leased to the Seaboard Airline Railway Company is owned jointly by the United Thacker and Coal and Crane trustees.

Mr. TYNES. I said exactly the opposite: Owned in severalty, forty percent of the total acreage being owned by the Coal and Crane and sixty percent or a little over by the United Thacker Coal Company.

Mr. EANET. Do you know the personnel of the trust?

Mr. TYNES. Do you mean do I know them personally?

Mr. EANET. Who they are.

The EXAMINER. You mean of the Coal and Crane Company.

30(170) Mr. TYNES. I know the trustees only, or two of them, Mr. Lawes and Mr. Cole. I do not know Mr. Stephens.

Mr. EANET. Do you know their residence?

Mr. TYNES. The office of the trust is in Cincinnati. One of them lives in Cincinnati, I believe. I rather think Mr. Cole is a lawyer, I know him personally, slightly, in Indiana—maybe in Peoria. Is that in Indiana or Illinois?

Mr. EANET. Can you state in whom the ownership of this trust is?

MR. TYNES. No; I don't know. The heirs of Mr. Crane, formerly of Cincinnati, and of Mr. Cole, formerly of Indiana or Illinois or Ohio—one of those three States.

MR. EANET. Thank you very much.

CROSS-EXAMINATION

The EXAMINER. Let the record show that Mr. Plummer is recalled as a witness for the applicant, on cross-examination by Mr. Harrington.

MR. HARRINGTON. Mr. Plummer, could you tell us whether or not the Seaboard Airline Company is authorized to mine coal in West Virginia under their charter?

MR. PLUMMER. Seaboard is authorized under its charter, of course, to conduct and operate railroads and to perform any incidental duties, and aside from that the Seaboard was authorized by a specific court order to enter into these contracts.

30(171) MR. COCKE. You mean the receivers.

MR. HARRINGTON. How about the charter of the Seaboard Airline Company?

MR. PLUMMER. The charter, of course, authorizes Seaboard to engage in the transportation business and incidental activities. Of course necessarily its right to acquire coal and so forth it seems to me is within the broad charter powers of the corporation.

MR. HARRINGTON. But the charter, of course, doesn't specifically provide that they are to operate coal mines.

MR. PLUMMER. No.

MR. HARRINGTON. In deference to the receivers of the Seaboard Airline, what right have they to mine coal in West Virginia?

MR. PLUMMER. The Receivers have been granted that right by express court order.

MR. HARRINGTON. That court order was the order which authorized them to enter into these contracts?

MR. PLUMMER. Not only that. The Receivers have broad general powers to acquire coal and to enter into contracts from time to time for the purchase of all materials required in the operation of the railroad and the acquisition of it.

MR. HARRINGTON. Do you have a copy of that order?

MR. PLUMMER. I haven't, but we would be glad to file one with the Commission.

30(172) MR. COCKE. Do you want a copy of that order put into the record?

MR. HARRINGTON. I would like to have a copy of it. That's all.

CROSS-EXAMINATION

The EXAMINER. Mr. Shunk, will you take the witness stand for further cross-examination?

Mr. EANET. Mr. Shunk, will you explain in some detail the practice between your company, that is, the Peerless Company, known as the operating company, and the Receivers of the Seaboard Airline Railway concerning the method of billing the Seaboard Airlines for the coal that you mine, and in turn the Seaboard Airline method of payment to your company?

Mr. SHUNK. The practice of billing? We render them an invoice each week for the coal mined the previous week, and usually about a week following the date of rendering the invoice we receive a check from them from the railroad Receivers for the coal. Is that in sufficient detail?

Mr. EANET. Now will you give in some detail the preparation of your invoice? What do you base your invoice on? How do you prepare it?

Mr. SHUNK. Merely so many tons of coal as produced during the week at so much per ton.

Mr. EANET. Where is that determined? Where do 30(173) you determine that you produce so many tons a week? Can you give us the steps?

Mr. SHUNK. Oh, yes. The steps of that are that our auditor gets the railroad weights. As I stated yesterday, I am not sure whether that weighing station is Norton or Andover.

The EXAMINER. Where is Norton and where is Andover? Are they in the State of Virginia?

Mr. SHUNK. Yes, sir. From the the certified railroad weights the billing is made to the Seaboard Receivers.

The EXAMINER. When you speak of billing, is there any destination, or is it loaded at the mine on cars of the railroad company?

Mr. SHUNK. It is loaded at the mine on the cars of the railroad company.

The EXAMINER. Is it what they call blank billing? What type of billing is it?

Mr. SHUNK. I have forgotten the railroad term for that. It is merely a form that the railroad company uses for directing the coal to various destinations.

The EXAMINER. You don't mean a waybill, I mean a bill of lading?

Mr. SHUNK. It could be that, yes.

The EXAMINER. Does the bill show the destination 30(174) of the coal?

Mr. SHUNK. I think so. I have never seen one of them.

Mr. EANET. Have you personally perused any of those bills of lading, Mr. Shunk?

Mr. SHUNK. No; that is handled by our auditor.

Mr. EANET. When you say "our auditor" you mean the auditor of the Peerless Coal Company?

Mr. SHUNK. Yes.

Mr. EANET. Do you maintain and keep a separate set of books for the coal produced at the mine?

Mr. SHUNK. Yes.

Mr. EANET. Do you maintain and keep a separate bank account?

Mr. SHUNK. We have a bank account, not separate from anything else, though. We have just one bank account.

Mr. EANET. Is that separate and independent from the jurisdiction or supervision of—

The EXAMINER. You mean from the bank account of the Receivers of the Seaboard Airline?

Mr. SHUNK. It is separate.

Mr. EANET. Do you know approximately the number of persons employed by you in the mining of this coal?

Mr. SHUNK. As of the twentieth of this month there were 251 employees on the pay roll.

Mr. EANET. And how are they paid?

30-175) Mr. SHUNK. They are paid bi-monthly; twice a month.

Mr. EANET. Who are they paid by?

Mr. SHUNK. They are paid by the Peerless Coal Corporation at our office.

Mr. EANET. Is it cash or check?

Mr. SHUNK. Mostly cash. All of the mine workers are paid by cash. Perhaps the Superintendent and Chief Electrician and a few salaried men are paid by check of some kind.

The EXAMINER. I assume from the funds of the Peerless Coal Corporation and formerly from the funds of the Receivers of the Glamorgan Coals, Inc.

Mr. SHUNK. That's right.

Mr. EANET. Do you operate any other mines?

Mr. SHUNK. I don't operate any other mines. I manage another property, the Puritan Coal Corporation, in West Virginia.

Mr. EANET. You mean the Peerless Coal Company, when you speak of yourself, manages—

Mr. SHUNK. No; not the Coal Company. The Peerless Coal Company doesn't operate any other mine except the Glamorgan mine.

Mr. EANET. But you personally operate another mine in West Virginia?

Mr. SHUNK. That's right.

Mr. EANET. Mr. Shunk, who pays the Workmen's 30(176) Compensation of the employees and officers of the Peerless Coal Company?

Mr. SHUNK. We pay it. The Peerless Company pays the compensation to employees through the Bituminous Casualty Company.

Mr. EANET. Who pays the Social Security deductions?

Mr. SHUNK. We pay that direct to the Federal and State Governments.

Mr. EANET. When you say "we" you mean the Peerless Coal Company?

Mr. SHUNK. The Peerless Coal Company.

Mr. EANET. For the record, this questioning of the witness is with reference to the Glamorgan mine. Mr. Shunk, when do you consider that your responsibility for the manufacturing, preparing, mining, and shipping of that coal ceases, and the responsibility of the Receivers of the Seaboard Airline Railroad Company commences? In other words, when do you consider the transfer of title to that coal from your own responsibility to the railroad company?

Mr. SHUNK. As our contract agreement indicates, we do place the coal on the railroad car. My interpretation is that our responsibility ends when we put the coal into the railroad car and load the railroad car at the mine.

Mr. EANET. In other words, if I interpret your statement correctly, you consider your transfer of title to that coal mined ceases at the time that the coal is loaded into the 30(177) railroad cars?

Mr. SHUNK. We have no title to that coal, it is my understanding. We are mining coal for the Seaboard Railroad Receivers as contractors.

Mr. EANET. When I refer to your title to it, you have some supervision of that coal. You have a certain responsibility in preparing that coal.

Mr. SHUNK. Our responsibility is to mine and load it on the railroad car.

Mr. EANET. And when does that end?

Mr. SHUNK. That ends when we place the coal in the railroad car.

Mr. EANET. That coal, as you testified, has to meet with certain specifications as outlined in the contract. Is that correct?

Mr. SHUNK. That is right.

Mr. EANET. Is an inspection made of that coal by the Receivers of the railway company before they accept it?

Mr. SHUNK. Yes; they have an inspector that visits the mine periodically and inspects as to the quality of the coal loaded.

We have our own inspector at the mine, a foreman inside (it is part of their duty) and we have an inspector in the railroad car who inspects the coal and picks impurities from it as it is loaded in the railroad car.

Mr. EANET. Has any dispute arisen in regard to the 30(178) meeting of the specifications?

Mr. SHUNK. No disputes. The inspector, however—

The EXAMINER. I doubt very much that that is germane to any issue in this hearing. I don't want to cut you short, but we have got to conclude the hearing this morning, unless you can hook it up with something, Mr. Eanet. Do you have in mind rejections or something of that nature that may find their way into the commercial market?

Mr. EANET. What happens with the rejected coal that doesn't meet with the specifications?

Mr. SHUNK. If anything is rejected by the inspector it is shoveled out of the railroad car and reprepared. Our coal, Mr. Eanet, is very clean as it is loaded at the face. There are very little impurities to be picked from it at the tipple, the dumping point, except an occasional piece of refuse or slate.

Mr. COCKE. It might be worth while explaining that the purpose of the specifications is to make that coal suitable for railroad fuel and railroad use.

The EXAMINER. And Mr. Shunk, you don't understand that any of the coal that is rejected by the inspectors for the Seaboard Airline Receivers is ultimately sold for commercial purposes?

Mr. SHUNK. No.

The EXAMINER. Would you say it is reprepared, rescreened, or recleaned, and again appropriated to this particular 30(179) contract?

Mr. SHUNK. As I started to say, Mr. Examiner, the only thing we have to take from our coal is perhaps a piece of slate, maybe half as large as your hand or as large as your hand, that has got into it. That is merely thrown out of the railroad car by the inspector or slate picker.

The EXAMINER. That would not be classified as coal, would it?

Mr. SHUNK. No; it is usually a piece of 100 percent ash impurity, a piece of slate or rock.

The EXAMINER. I think possibly Mr. Eanet had the impression, and I think maybe I did in the early part of the hearing, that possibly carloads of coal were rejected. I am sure he was interested, and Mr. Meany of the Marketing Division was interested, in the ultimate disposition of that coal. I understand you now that there is no such rejection.

Mr. SHUNK. No. Occasionally our attention is called to the coarseness of the coal. The miners get a little careless in shoot-

ing it, make too much fine coal, and we have to watch that phase of our preparation.

Mr. EANET. You testified that you are the manager of the Puritan Oil Coal Company and had some properties in West Virginia. What becomes of the coal that is mined there by you?

Mr. COCKE. We object to that. It has no earthly 30(180) bearing on this question.

The EXAMINER. Unless you show some hook-up between that and the issues here, I am disposed to sustain the objection.

Mr. EANET. Let me rephrase my question, and before you answer this you can give counsel for the railroad company an opportunity to object. The coal that is mined by you in West Virginia for the Puritan Coal Company—is that prepared for the Seaboard Airline Railway Company or for other commercial use?

Mr. SHUNK. That coal is shipped north from there. To what destination I can't tell you.

Mr. EANET. For whose account?

Mr. SHUNK. For various accounts. The coal is sold through a sales agency.

Mr. EANET. Through what sales agency?

Mr. SHUNK. Percy Heilner & Company, of Philadelphia.

Mr. EANET. None of that coal, as I understand you, is prepared or sold to the receivers of the Seaboard Airline at the West Virginia mines of the Puritan Coal Company?

Mr. COCKE. He did not testify to anything of the sort. He testified that none of that coal was sold to the Seaboard, and I object to this as completely irrelevant unless there is some showing made that the Seaboard has some interest in this 30(181) coal purchased from an entirely different mine. It would have no earthly bearing on any issue in this matter.

The EXAMINER. The objection is sustained.

Mr. EANET. That is all, Mr. Examiner.

Mr. EANET. That is all, Mr. Examiner.

Mr. EICHELBERGER. No, sir.

REDIRECT EXAMINATION

Mr. PLUMMER. Has the Peerless Coal Corporation any source of income other than the compensation it receives from the Seaboard Receivers for its service in mining this coal?

Mr. SHUNK. None whatever, Mr. Plummer.

Mr. PLUMMER. Is it or is it not a fact that in the construction of the flat-price sum per ton compensation which has been agreed

upon between the Peerless Corporation and the Seaboard Receivers that all elements of cost, including Social Security and other taxes which are paid by the Peerless Corporation, are included in that price?

Mr. SHUNK. That is right.

Mr. PLUMMER. As I understand it, you receive payment of this compensation from Seaboard Receivers weekly, do you not?

Mr. SHUNK. Yes.

Mr. PLUMMER. Is it not a fact that those funds paid to the Peerless Coal Corporation weekly furnish you with the funds from which you compensate your miners and pay your 39(182) other items of expense?

Mr. SHUNK. That's right. We pay, of course, all of our items of expense from the proceeds from the coal as received from the Seaboard.

Mr. PLUMMER. The Peerless Coal Corporation produces no coal for anybody, any person, nor any corporation—

Mr. SHUNK. Nothing other than has been mentioned.

Mr. PLUMMER. All coal produced at the Glamorgan mine by the Peerless Coal Corporation is owned by the Seaboard Receivers, is it not?

Mr. SHUNK. That's right.

Mr. PLUMMER. And the Peerless Coal Corporation produces no other coal or sells any other coal commercially or otherwise?

Mr. SHUNK. Except a very small portion of the total tonnage, to employees, which we call tenement coal.

Mr. PLUMMER. That tenement coal is sold under the terms—

Mr. ANSELL. I am going to object to these leading questions as going too far. Counsel is testifying. This is introductory matter.

The EXAMINER. Do you consider that controversial?

Mr. ANSELL. It may be. He is just putting words into the witness's mouth now.

The EXAMINER. This is concerning the relationship between the Peerless and the Receivers of the Seaboard Airline.

39(183) Mr. ANSELL. I think he can rephrase the questions and get the testimony just as fast, if it is testimony.

The EXAMINER. Would you mind doing that, Mr. Plummer?

Mr. PLUMMER. Will you state whether or not the Peerless Corporation has any source of income other than the compensation paid to it by the Receivers of the Seaboard Airline Railroad Company?

Mr. SHUNK. We have no other source.

Mr. PLUMMER. Will you state whether or not the expenses of your operations, including taxes, Social Security and otherwise,

which the Peerless Corporation pays, are paid out of funds, compensation received by the Peerless Company from the Seaboard Receivers?

Mr. ANSELL. That question has been asked before. I object.

Mr. PLUMMER. Or are they paid from funds derived from any other source?

Mr. ANSELL. I object. That has all been gone over before.

The EXAMINER. That is repetitious.

Mr. COCKE. We are endeavoring to meet Mr. Ansell's objection.

The EXAMINER. The objection was not sustained, and it is in the record. This is repetition.

Mr. PLUMMER. That is all, Mr. Shunk.

30(184)

CROSS-EXAMINATION

Mr. HARRINGTON. Has the Peerless Coal Company paid any dividends?

Mr. SHUNK. No, the Peerless Company has just been in existence since the first of this month. They have paid no dividends.

Mr. HARRINGTON. Does it show a profit on this contract?

Mr. SHUNK. I can't tell you until the cost statement is prepared for this month. We will prepare a cost statement monthly.

Mr. HARRINGTON. How about last month?

Mr. SHUNK. Then the operation was in the hands of the receivers of the Glamorgan Coals.

Mr. HARRINGTON. How about the receivers? Did they show a profit on the contract with the Seaboard Airline?

Mr. SHUNK. No.

Mr. HARRINGTON. Did they lose money?

Mr. SHUNK. Yes. That, however, I might add, is not wholly due to the price paid the receivers by the railroad receivers. It was mostly due to the fact that the mine had been more or less badly managed and the equipment and facilities pretty much depleted, which resulted in high operating costs.

Mr. HARRINGTON. Has that condition been changed now?

Mr. SHUNK. We have started since the first of the 30(185) month to rehabilitate the mine, the equipment, tracks and facilities so that we can operate without losses.

Mr. HARRINGTON. You get a little better price for your coal now than you did under the receivership?

Mr. SHUNK. The same price.

The EXAMINER. Mr. Plummer, in view of Mr. Shunk's testimony, that the Peerless started operating about the first of this month, that is the first of September. I just now notice that your petition is filed on August 21 of this year. I wish you would give some consideration as to the necessity of an amend-

ment to your petition to include the testimony with reference to this particular Peerless mine, and if you desire an amendment, dictate it into the record. Are you finished?

Mr. HARRINGTON. Yes, sir.

REDIRECT EXAMINATION

Mr. COCKE. I would like to ask Mr. Shunk one question. The previous question asked by Mr. Harrington was phrased in this way: "the price paid by the Seaboard for 'your' coal." I wanted to ask Mr. Shunk whether he meant by his answer to imply that the Peerless Corporation owned any coal in that mine that they were extracting for the account of Seaboard.

Mr. HARRINGTON. I object to that question. I think the answer of the witness is clear enough on that point.

The EXAMINER. He is entitled to answer the question.

Mr. COCKE. The witness has a right to explain his 30(186) testimony.

Mr. SHUNK. I think I did. No; we own no coal there as the operating company.

The EXAMINER. Are there any further questions from the Legal Division of the Commission?

Mr. HARRINGTON. No.

CROSS-EXAMINATION

Mr. ANSELL. Did the Receivers of the Glamorgan Coals, Inc., join the Code under the Bituminous Coal Act of 1937?

Mr. SHUNK. Yes.

Mr. ANSELL. When did they do that?

Mr. SHUNK. The exact date I can't tell you. I am not sure whether it was in the month of July or August. If I had my file I could answer it.

Mr. ANSELL. I think that is a matter of record. As Receivers of Glamorgan Coals, Inc., did the Receivers engage in any other business than mining and shipping coal from the Glamorgan mine on contract with the Receivers of the Seaboard Airline?

Mr. SHUNK. No.

Mr. ANSELL. Why, Mr. Shunk, did the Receivers join the Code?

Mr. COCKE. We object to that question as not a proper question of the witness, calling for an unauthorized conclusion and having no bearing in the issue.

The EXAMINER. Objection sustained.

30(187) Mr. ANSELL. I will take an exception to that. I can't conceive anything more material than that. This gen-

tieman was a proprietor of an outfit engaged in the mining of bituminous coal. He assented to this Code, joined this Code. He recognized by that fact that he was a producer of coal. Now he denies that he himself has produced any coal. I will take an exception.

The EXAMINER. Those facts are in the record.

Mr. ANSELL. The fact as to why he joined the Code is not.

The EXAMINER. You are asking him as to his intention, as to why he joined the Code. The objection is to your asking his intention as to why he joined. That objection is sustained.

Mr. ANSELL. I want the record to note an exception.

The EXAMINER. The exception will be noted.

Mr. ANSELL. Mr. Shunk, as a member of the Code, as Receiver of Glamorgan Coals, Inc., did you pay any assessments levied by any District Board under the provisions of Section 4 of the Act?

Mr. SHUNK. We haven't paid any assessments as yet, Mr. Ansell. I think we had one bill for an assessment which has been held for payment when the Receivers' affairs are wound up. I think there is one invoice for an assessment, if I remember correctly, in the neighborhood of \$65. That was held for 30(188) payment along with other invoices for material and supplies used during the Receivership.

Mr. ANSELL. That has not been held pending the outcome of this application for exemption?

Mr. SHUNK. Not for that purpose. It is a matter of the Receivers' accounting.

Mr. ANSELL. Has Peerless Coal Corporation ever joined the Code?

Mr. SHUNK. No. We have assumed there, whether our assumption is correct or not I don't know, Mr. Ansell, that complying with the contract between the railroad company and Glamorgan Coal and the contract between the land-owning company and Glamorgan Coal, in accordance with the court decree there, we as a new company assumed the responsibilities of the Receivers, and therefore we assumed that since the Receivers had joined the Code we are a member through their acceptance.

Mr. ANSELL. You assume that you stepped into the shoes of the Receivers as members of the Code?

Mr. SHUNK. That's right.

Mr. ANSELL. Have you paid any assessment levied by any District Board under the provisions of Section 4 as the Peerless Coal Corporation?

Mr. SHUNK. No.

Mr. ANSELL. Has any assessment been made?

Mr. SHUNK. Not to my knowledge.

Mr. ANSELL. How much coal have you produced in the Glamorgan mine since you became one of the co-receivers 30(189) of Glamorgan Coals, Inc.?

Mr. SHUNK. Approximately 80,000 tons.

Mr. ANSELL. That is up to what date?

Mr. SHUNK. The first of September. At that time the operation of the property was turned over by the court to the new operating company.

Mr. ANSELL. Has any of that coal been sized?

Mr. SHUNK. No. It is all dumped, min run, into the railroad cars.

Mr. ANSELL. That is all.

The EXAMINER. Are there any further questions of this witness?

Mr. PLUMMER. Mr. Examiner, I would just like to be permitted to make a statement in connection with the question Mr. Ansell has asked the witness. He has asked the witness about 4-B assessments. The Receivers have been billed for the assessment on that same tonnage. Those bills have not, as yet, been paid by the Receivers. We have received a communication from the District Board asking whether the Receivers considered themselves liable for this assessment, and we replied that we did and asked the Board if it would be satisfactory for us to hold payment of that assessment pending this application. That is the way the matter stands at the present time.

The EXAMINER. Does that statement meet your question, Mr. Ansell?

20(190) Mr. ANSELL. I asked this witness whether he had paid any assessment. I didn't ask Mr. Plummer whether he had paid. I am perfectly willing that that go into the record.

Mr. MEANY. Mr. Shunk, there is a provision in your contract, both the contract of the Glamorgan Coals, Inc., in receivership, and later the contract of the Peerless Coal Corporation, which allows the Seaboard Airline to inspect and reject coal after coal has reached its destination. In other words, if there has been no acceptance of coal by the Receivers of the Seaboard at the mine when loaded, they can subsequently reject that coal. Has there ever occurred such a rejection?

Mr. SHUNK. We have never had any experience of that sort. Of course, we take every precaution to guard against that sort of thing, and know that the coal meets the specification before it leaves the mine.

Mr. MEANY. Do you, in your understanding of that provision of the contract, have any idea that if such a contingency occurred, what the disposition would be of that coal, whether it would be accepted by the Seaboard and charged off against your account payable?

Mr. SHUNK. I understand that it would not be acceptable by Seaboard, therefore they would not pay for coal that did not meet specifications.

Mr. MEANY. What would then happen to that coal?

Mr. SHUNK. I don't know off-hand what might be 30(191) the disposition of it.

Mr. MEANY. Do you have any understanding or right in that coal in the event it was rejected?

Mr. SHUNK. I imagine if that were to occur Seaboard would simply say to us as the shippers, "This coal doesn't meet specifications. Here it is. What are you going to do with it?" We might, of course, come to some agreement as to what that coal would be worth, and they would accept it on that basis.

Mr. COCKE. This is purely a hypothetical case, Mr. Examiner. We are delving into the realms of conjecture. What would happen in the future seems to me highly speculative.

The EXAMINER. Mr. Meany, of the Marketing Division, has some object he would like to get to. I would like for him to develop that.

Mr. MEANY. I won't ask any more questions of this witness. I will of Mr. Pritchard.

The EXAMINER. Are there any further questions of Mr. Shunk? You may be excused, Mr. Shunk.

Mr. COCKE. Before calling the next witness, Mr. Examiner, and for the purposes of the record, in regard to the request by Mr. Harrington that we furnish a copy of the order of the Seaboard Receivership Court authorizing the execution of 30(192) this agreement and the accompanying leases of the coal properties from the owners, and I assume that that question would apply not only to the Glamorgan operations but to all of the others, merely for the purpose of clarifying the record I would like to make the point that even though there were no Seaboard charter provisions specifically authorizing the mining of coal, and even though it could by any conceivable theory be considered that the Receivers have no essential legal authority to mine coal, yet that could not be put in issue here because that would be a collateral attack on the undertakings of the Receiver and on the order of the court, and no such question may be raised except on direct attack by some party interested. I just want to make that point, in order that the record will be clear.

The EXAMINER. I am sure the Commission will appreciate, and I know I would like to have a certified copy, if you will, to be considered as evidence in the case (if not offered by you that is all right), of the applicable charter provisions of the Seaboard Airline and the applicable provisions of the decree

appointing the Receivers with reference to these various mining operations.

Mr. COCKE. Perhaps I would like to explain this situation. The Seaboard Airline Railway corporate charter is one of the most involved legal situations that I know anything about, for this reason: The Seaboard Airline Railway Company, the 30(193) present corporation, for whose affairs these Receivers,

Mr. Powell and Colonel Anderson were appointed, is a consolidated corporation under the laws of five Southern States: Virginia, North Carolina, South Carolina, Georgia, and Florida. It also does business in Alabama as a foreign corporation.

Now, the Seaboard properties were originally owned by a dozen or so separate companies. The beginnings of the Seaboard go back 100 years to the organization under a special Act of the Virginia legislature of the Seaboard and Roanoke Railroad Company. By merger and consolidation provisions under Acts of the various legislatures the Seaboard Airline Railroad Company acquired a charter which, as I say, is the charter as a consolidated corporation under the laws of five separate states, and numerous of the charter provisions of the old constituent companies were taken over and became inherent parts of the charter of the Seaboard Airline Railway Company.

To give the charter history of the Seaboard would be a very involved proceeding, but we wish to comply with the wishes of the Examiner and we will do the best we can to pick around through the corporate history that goes back 100 years with dozens of special Acts of the legislatures before general corporation laws were enacted by the various states. It is going to be a very involved and difficult proceeding.

The EXAMINER. Now, Mr. Cocke, I don't want it to be too involved. The Seaboard Airline is incorporated in 30(194) some state as it presently operates—the corporation itself is incorporated in one state or more than one state.

Mr. COCKE. It is a very curious situation, Mr. Examiner. It is what is called a consolidated corporation, whereby charters granted by Virginia, North Carolina, South Carolina, Georgia, and Florida became merged into one charter, and that charter became the charter of the consolidated corporation.

The EXAMINER. What sovereignty granted that consolidated charter?

Mr. COCKE. All of them. All the states that I have mentioned had to approve this consolidation.

The EXAMINER. Now, then, you speak of this consolidation. That is in one instrument, isn't it?

Mr. COCKE. No. As I say, the consolidation is not in one instrument. It is in—I can't say whether it is a dozen or more.

But there were special Acts of various legislatures and consolidation agreements which were approved in one way or the other by the authorities of the various states and for that reason it is an extremely involved situation so far as the Seaboard charter is concerned. I know of nothing like it in any corporate history.

The EXAMINER. I would be interested in this, Mr. Cocke: In having the provisions of the purposes and the powers granted in the record from the various charters, or from the consolidated charter, as you characterize it.

30(195) Mr. HARRINGTON. What I was asking for was the record of this case in authorizing them to do business in West Virginia. They are coming in and setting up that they are operating a coal mine in West Virginia. What I asked the witness was the right of the Seaboard Airline to do business in the State of West Virginia. Was that right given them under their charter, not taking into consideration the states of Florida or any other states they are operating in, and also whether or not the trustees were authorized to do business in the State of West Virginia as coal operators.

The EXAMINER. Will you also include Virginia, because the Glamorgan mine is in Virginia?

Mr. COCKE. Mr. Harrington is under a misapprehension. There is no Seaboard Airline Railway Company charter for doing business in West Virginia. The Seaboard Airline Railroad Company nor the Receivers have any lines of railroad in West Virginia, although they may conduct certain of their activities related to interstate operations, such as the maintenance of passenger offices and solicitation forces in the State of West Virginia. It has no charter to do business in the State of West Virginia.

Mr. HARRINGTON. They are doing business in the State of West Virginia as a foreign corporation, then.

Mr. COCKE. No; the Seaboard Airline Railway Company is not doing business as a corporation at all, because the

30(196) Receivers are in charge of the properties. The Receivers don't act on behalf of the Corporation; they act as a custodian of the properties under the orders of the court and they do not exercise corporate functions as such. They are officers of the court operating under the orders of the court.

The EXAMINER. Would it be difficult to submit for the record that part of the consolidated charter that has reference to the purposes of the Seaboard Airline and the powers granted, with particular reference to the acquisition and mining of coal?

Mr. COCKE. There is no specific provision I know of about the acquisition and mining of coal. Our contention is that the right to acquire coal for railroad purposes is an essential incident of

charter power as the courts have repeatedly held. We have perhaps no charter provisions authorizing us to manufacture a rail or manufacture a locomotive, but unquestionably if the Receiver wishes to decide to set up his own manufactory of either rails or locomotives it would unquestionably be an incident of normal charter power. We will endeavor, Mr. Examiner, to give you such charter provisions as we think confer broad powers to which the powers that we are now asserting are necessarily incident. Does that answer your inquiry?

The EXAMINER. Partly. Would you also include the applicable provisions with reference to this same point of the decree of the Federal Court appointing the Receivers of 30(197) the Seaboard Airline?

Mr. COCKE. Yes, sir.

(Whereupon a recess was taken from 11:00 until 11:30 o'clock.)

DIRECT EXAMINATION

Mr. PLUMMER. Mr. Gaudin, will you state your name and residence, and in what capacity you are employed by the Seaboard Receivers?

Mr. GAUDIN. Joseph L. Gaudin, Norfolk, Virginia. I am and have been, since previous to 1934, continuously employed as fuel representative in the Purchasing Department of the Receivers of the Seaboard Airline Company.

Mr. PLUMMER. What duties, as such employee, do you perform in connection with coal produced at each of the mines involved in this hearing?

Mr. GAUDIN. Among my other duties I give monthly and weekly instructions to the captive mine operators as to the tonnage to be mined and shipped therefrom to meet the Receivers' requirements at specified points on the Receivers' line to which such captive mine coal is to be shipped.

Mr. PLUMMER. You mean these mines involved in these proceedings?

Mr. GAUDIN. Yes, sir.

Mr. PLUMMER. Can you state whether or not all of the coal shipped from these mines is shipped to the Receivers for the consumption and use by the Receivers, or is it shipped to any other parties for any other purposes?

30(198) Mr. GAUDIN. It is shipped to the Receivers and to no other party except a small amount of house coal that is used by the labor employed around the mine.

Mr. PLUMMER. Is it your understanding that that house coal is disposed of for account of the Seaboard Receivers?

Mr. GAUDIN. Yes, sir.

Mr. PLUMMER. Can you tell us whether or not coal shipped from this mine by or for account of the Seaboard Receivers is shipped at the Receivers' own risk?

Mr. GAUDIN. Yes, sir; the receivers own the coal and it is shipped by ~~or~~ for the account of the Receivers, and the Receivers have to stand any loss due to wrecks, theft, or other losses in transit, and to the extent, of course, such losses can't be recovered by the off-line carriers.

Mr. PLUMMER. What other duties do you perform with respect to the so-called captive mine coal?

Mr. GAUDIN. I arrange for the approval of payment of vouchers, both for the compensation to the Receivers' operator, payable by the Receivers for the work and service performed by him, and for the royalties payable to the Receivers' landowners.

Mr. PLUMMER. Can you state whether or not these royalties are paid by the Receivers to or for the account of the landowners?

Mr. GAUDIN. Yes, sir.

Mr. PLUMMER. From whom do you receive instructions as to the distribution of coal from these mines?

Mr. GAUDIN. From the Transportation Department.

The EXAMINER. Of the Seaboard Airline Receivers?

Mr. GAUDIN. Yes, sir.

Mr. PLUMMER. Can you state, Mr. Gaudin, whether or not work and service performed by the operator employed by the Receivers at these mines is performed solely for the Receivers?

Mr. GAUDIN. Yes; solely for the Seaboard Receivers.

Mr. PLUMMER. So far as your knowledge goes, these operators produce no coal there—no coal is produced at these mines except for the Receivers?

Mr. GAUDIN. That is correct.

Mr. EANET. Mr. Plummer is continuing his leading questions and for the purpose of the record we would like to have the witness give his answer, rather than Mr. Plummer give the answer for the witness.

The EXAMINER. We can get along just a little bit faster on noncontroversial matters. I have in mind that leading questions are not really objectionable. We are trying to expedite the hearing a little bit. I will ask Mr. Plummer to state his questions in some form other than a leading form if possible.

Mr. PLUMMER. All right, Mr. Examiner. I will have that in mind in the future. Mr. Gaudin, have you any knowledge as to whether or not any of the coal produced at either of these three mines has ever been rejected by the Seaboard Receivers?

Mr. GAUDIN. I have no knowledge of any rejections.

Mr. PLUMMER. I understand, so far as your information goes, none of this coal has ever been rejected.

Mr. GAUDIN. None of this coal has ever been rejected.

Mr. PLUMMER. Is it your understanding (and I think you have so testified) that this coal is coal belonging to the Seaboard Receivers?

Mr. GAUDIN. It is my understanding that the coal is owned by the Receivers.

Mr. PLUMMER. Let us assume, for the purpose of argument, that some rejection of this coal would occur. What, in your judgment, would occur? Would the Receivers have any use for that coal?

Mr. GAUDIN. Yes. If the coal was on line and was rejected, as you said, and was unfit for locomotive use, we would take that and send it to some of our stationary boilers, where it doesn't require that high grade of coal.

Mr. PLUMMER. That is all of my question.

CROSS-EXAMINATION

Mr. EANET. Am I correct, Mr. Gaudin, that the procedure with reference to the shipping and instructions as to the transportation of the coal mined is the same for all three mines?

Mr. GAUDIN. It is the same, except for the amount of tonnage that we would order.

30(201) Mr. EANET. So that when we go into some detail as to the transportation destination, the responsibility for the coal at these various mines, you speak for all three mines, with the exception of the tonnage?

Mr. GAUDIN. I speak for all three with the exception of the tonnage. Of course, at different mines we would bill coal to different points on different routes, because all of the mines are not located in the same freight rate group.

Mr. EANET. Do you know, Mr. Gaudin, the extensiveness of the various designations for us by the railroad company?

Mr. GAUDIN. I know where I give instructions for the coal to be shipped. I designate the billing point and after that coal reaches our line then it becomes an operating proposition and the distribution of the coal thereafter is done by the Operating Department.

Mr. EANET. Do you have any knowledge of where the coal coming out of those three mines, or for what specific area of the railway's operation that coal is allocated?

Mr. GAUDIN. As I said a moment ago, that question I couldn't answer, because that is an Operating Department problem. I can testify as to the billing points.

Mr. EANET. Where do you bill the coal coming out of the mines?

Mr. GAUDIN. In the case of the William-Ann, as a general thing I bill it to Ryan, Virginia; Hartman, Virginia; Coolan, North Carolina; and Gibson, North Carolina. In the 30(202) case of the Chilton mine No. 1 I generally bill it to Apex, North Carolina, and to Hann, Virginia. In the case of the Peerless Coal Corporation, that coal as a general thing is billed to Wiggins, South Carolina. You understand, occasionally we have to change those destinations. We might bill a portion of this coal to Stubbs, North Carolina.

The EXAMINER. Could you give the approximate number of net tons billed during the course of a year, say 1936, to these various destinations that you have just testified to?

Mr. GAUDIN. I could not. I don't have that information.

The EXAMINER. Those billings represent practically the entire tonnage of the mines with the exception of such coal as is sold to the employees?

Mr. GAUDIN. That's right.

Mr. EANET. Where do you take supervision of the coal from the three mines?

Mr. GAUDIN. I didn't understand that.

Mr. EANET. Where does your supervision of the coal from the three mines occur? You say you assume the responsibility of that coal for its distribution.

Mr. GAUDIN. We own the coal.

Mr. EANET. I know you own the coal, but when do you take it off the hands of your operator?

Mr. GAUDIN. Well, when the operator loads the coal at the tippie in the cars, it is our coal in the mine. The receivers have the lease. He performs the service and his agreement is for leading the coal in the cars.

30(203) Mr. EANET. Who loads the coal in the cars?

Mr. GAUDIN. The Receivers' operator.

Mr. EANET. Isn't there some period when there is an inspection made? According to the contract, that coal is inspected.

Mr. GAUDIN. We have a fuel inspector and he makes periodical inspections of the coal produced at all three of the captive mines.

Mr. EANET. What about the coal that reaches its destination and under the terms of the contract may not be satisfactory?

Mr. GAUDIN. Well, if a car of coal should reach our line of railroad and was unsatisfactory and rejected, unfit for locomotive use, we would take that car of coal and use it at some pump station or stationary boiler; or some place of that sort, inasmuch as it is our coal.

Mr. EANET. Is the price of that coal that is rejected different from the price of the coal under the contract?

Mr. GAUDIN. We don't buy the coal, but the compensation that we would pay the operator for the work and service performed would be the same on that coal as it would on the other coal.

Mr. EANET. If I understand you, then, the responsibility to that coal from the operator so far as the operator is concerned ceases at the tippie, and the responsibility from there on is the responsibility of the railway company, with the 30(204) exception of that coal that may ultimately be rejected at its destination, not meeting with specifications. Am I correct in that?

Mr. GAUDIN. Yes; that is our responsibility after it is loaded on the railroad cars.

Mr. EANET. Do you have any supervision of the actual mining of the coal by the operator?

Mr. GAUDIN. No, sir.

Mr. EANET. Do you have any authority to instruct him as to who should be employed at that mine?

Mr. GAUDIN. No, sir; I do not.

Mr. EANET. As to how the coal is to be mined—taken out of the mine?

Mr. GAUDIN. No, sir; I think our specifications cover that, as to how they shall mine the coal, the grade of coal.

Mr. EANET. You stated that you approve the vouchers for payment. Will you explain the detail, how you arrive at the approving of these vouchers for payment?

Mr. GAUDIN. Well, under the agreement, if I am permitted to speak of all three of them at one time, practically the same handling.

Mr. EANET. Pardon me, but if you think one agreement is different from the others, you may set out where it is different.

Mr. GAUDIN. I will state it separately, then. In the case of the William-Ann mine, under the agreement the operator prepares at the end of the month a statement which he sends to 30(205) the Receivers showing the coal mined, loaded, and shipped under the agreement. This statement shows the date the coal is shipped, the individual car numbers and initials, and the net weight, and the operator's compensation for the work and service performed. When that statement reaches the Purchasing Agent's office I approve the compensation to be paid the operator. Then I send it to the Auditing Department.

Mr. EANET. What do you base your approval on? You say you approve that statement.

Mr. GAUDIN. On the agreement.

Mr. EANET. Are there some records that you may possibly have that will verify the amount of tonnage claimed produced by the operator?

Mr. GAUDIN. This statement that I was telling you about shows the total tonnage he shipped under my instructions.

Mr. EANET. Is that statement checked with any record of yours?

Mr. GAUDIN. No; I don't check it with any record in so far as the tonnage is concerned, because there would naturally be a variation from the tonnage I direct him to mine and ship on account of the coal being weighed, he not having the available weight right at the mine at the time he loads the coal. Naturally there would be some variation up and down, but it doesn't amount to very much.

Mr. EANET. Could you state the details of your transaction in the approval of the statement submitted by the 30(206) operator for a given month—what you base that on? Is it a bill of lading or just a plain billing?

Mr. GAUDIN. I do not receive any bills of lading, only in one case, and that is the case of the Glamorgan. The bills of lading may be mailed to our Auditing Department, where they check the statement. The bills of lading I receive from Glamorgan are sent to the Auditing Department, who audit the statement to determine whether the contractor has shipped the coal that the instructions call for. I compare the total tonnage that he ships to all of the points with the order that I sent him.

The EXAMINER. The total tonnage from each mine?

Mr. GAUDIN. No; the total tonnage that he ships from each point in each case, the Glamorgan, William-Ann, and the Chilton mine, with my order, to see if he has carried out the instructions. Then that statement, as I said, goes over to the Auditing Department.

Mr. EANET. Can you state the amount of coal, or from whom, other than these three mines, the Seaboard Airline Railway Company receives coal?

Mr. GAUDIN. Do you mean from commercial contracts?

Mr. EANET. Commercial or otherwise.

Mr. COCKE. I can't see what possible bearing that has on this—how much coal we buy from other sources.

Mr. MEANY. The Marketing Division is interested in that.

20(207) The EXAMINER. From what point of view?

Mr. MEANY. As to the total consumption, as to the effect on the market price of coal.

The EXAMINER. The issue is in this application, whether or not he—

Mr. MEANY. Whether or not it has any effect in depressing the price of commercial coal.

Mr. COCKE. That may be the subject of another inquiry, but it seems to me it is not the subject of this one.

Mr. EANET. Can you state the total consumption of coal by the railroad company?

Mr. COCKE. It has already been stated that it is about 1,000,000 tons a year.

The EXAMINER. Let's get it restated. I don't want it to go too far outside of the issues in this case.

Mr. EANET. What is the total consumption of coal for a period, say, of the last year—for the year 1936?

Mr. GAUDIN. I would say around 1,000,000 tons.

Mr. EANET. What percentage of that tonnage came from these three mines?

Mr. GAUDIN. I couldn't say what percentage of it came from there, because I don't know just how much was shipped from each of the mines.

Mr. EANET. Do you know approximately how much?

Mr. GAUDIN. If we did take the full estimated requirement from the captive mines it would be about fifty percent of the total tonnage.

Mr. EANET. Mr. Gaudin, can you name the states in which the Railway Company operates as a common carrier?

Mr. GAUDIN. I think it is Virginia, North Carolina, South Carolina, Alabama, Florida, and Georgia.

Mr. EANET. You ship coal from these mines to these various states?

Mr. GAUDIN. No, sir; I said a moment ago or a few minutes ago that I direct the operator to ship the coal to the State of Virginia, North Carolina, and South Carolina.

The EXAMINER. You might ask him if he knows the disposition of the coal after it reaches that particular destination.

Mr. EANET. What is the disposition of the coal after it reaches its destination?

Mr. GAUDIN. That then becomes an operating problem, and I don't know.

The EXAMINER. Mr. Eichelberger, any further questions?

Mr. EICHELBERGER. No.

The EXAMINER. Mr. Ansell?

Mr. ANSELL. I understood Mr. Meany, of the Marketing Division, had some questions.

Mr. MEANY. Mr. Gaudin, in your capacity with the Receivers of the Seaboard Airline Railway as fuel agent, and in connection with

the Purchasing Department, would you have any knowledge as to how much coal was sold commercially by the Seaboard Airline Railway or its Receivers prior to May 1937—say within the year of 1936?

Mr. GAUDIN. No, sir; I would not.

Mr. MEANY. You wouldn't know how many tons they sold or what they realized from the sale of that?

Mr. GAUDIN. No, sir.

Mr. MEANY. When you received orders from your various Division Superintendents as to their requirements to furnish orders to your mines, is that based upon the knowledge of use of certain equipment—in other words, some of which is stoker equipped and others which is manually fired, as to the sizing of coal that might be ordered from the mines?

Mr. GAUDIN. I don't receive orders from the Division Superintendents. The Transportation Department furnishes me with an order showing the requirements and, of course, in so far as the grade of coal is concerned, we use the same grade of coal on all of our locomotives. We have stoker fired locomotives and hand fired. Some are stokers and some are not stokers.

Mr. MEANY. About what percentage of your equipment is stoker equipment?

Mr. GAUDIN. I couldn't answer that, inasmuch as that is a Mechanical Department proposition. I have no knowledge of it.

Mr. MEANY. That is all.

The EXAMINER. Are there any further questions, Mr. Ansell?

Mr. ANSELL. Was any of the coal that has been shipped to the railway from any of these three mines during the period under which these arrangements have been in effect sized coal?

Mr. GAUDIN. Yes; if you wish to term it sized. I imagine this is what you mean: From the Glamorgan mine we receive a straight run of mine coal. From the William-Ann mine and the Chilton No. 1 we take a six-inch crushed run of mine coal, large lumps broken down to six-inch.

Mr. ANSELL. That is the only sizing that is done?

Mr. GAUDIN. That is the only sizing so far as I know. I have no knowledge.

Mr. ANSELL. That is all.

The EXAMINER. Are there any further questions? (No response.) That is all, Mr. Gaudin.

(Whereupon, at 12:05 p. m., the hearing was recessed to reconvene at 1:30 p. m. of the same day.)

30(211)

AFTERNOON SESSION

The Afternoon Session of the hearing convened at 1:30 o'clock in the Rose Room of the Hotel Washington, Washington, D. C.

Examiner CANTRELL. The hearing will be reconvened.

Mr. COCKE. In view of what I understood Mr. Harrington to tell me during the lunch hour, that counsel for the Commission would not insist on the production of the various charter provisions in view of what has gone before in the record I would like to have that confirmed on the record that they will not insist on that.

Mr. HARRINGTON. In view of the fact that counsel say that it is going to be such a hard job to get the copy of the consolidated articles of the incorporation of the Seaboard Airline Railway, in my talk with the other members of the legal division we have decided not to request that at this time—if it meets with the approval of the Examiner.

Examiner CANTRELL. That meets with the approval of the Examiner.

Mr. PLUMMER. In view of the evidence introduced at this hearing, to the effect that Peerless Coal Corporation has, since the filing of the receivers' petition, and before this hearing, succeeded the receivers of Glamorgan Coals, Inc., as the 30(212) parties performing for the receivers the work and service of extracting, mining, and loading the coal produced at the Glamorgan Mine, Applicant's petition is amended to show such successorship and to make relevant testimony given at this hearing with regard to Peerless Coal Corporation and its operations.

Examiner CANTRELL. Before we continue with the hearing, Mr. Harrington has requested that you gentlemen, attorneys for the receivers for the Seaboard, furnish for the record copies of the supplemental decrees, as I understand it, with reference to the operation of the three mines involved. Could you let me know when those supplemental decrees could be furnished?

Mr. COCKE. Promptly; they are in printed form. It is just a question of getting back to Norfolk and mailing them here.

Examiner CANTRELL. Within the next week?

Mr. COCKE. Oh, yes.

Mr. PLUMMER. Mr. Perry, will you take the stand, if you please?

Whereupon C. ALLEN PERRY, called as a witness on behalf of the Receivers for the Seaboard Airline Railway, having been previously sworn, was examined and testified as follows:

30(213) Direct examination by Mr. PLUMMER:

Q. Will you please state your name and residence and in what capacity you are employed by the Receivers of the Seaboard Airline Railway?

A. C. Allen Perry, Norfolk, Virginia. And I have been since previous to 1934 and now am employed as Chief Clerk, Transportation Department, of the Receivers of Seaboard Airline Railway Company. I am over 21 years of age.

Q. Mr. Perry, what are your duties?

A. I have general supervision of the office of the Transportation Department of the Receivers, and my duties include the distribution of coal obtained by the receivers for use in the operation of the railroads in their possession and control. I estimate the monthly coal requirements of the receivers and advise the Purchasing Department thereof. On the basis of this estimate I also inform the Purchasing Department of our weekly tonnage requirements.

Q. What duties do you perform in connection with coal distribution shipped to the receivers from the three mines involved in this hearing, that is from the Glamorgan Mine in Wise County, Virginia, the William Anne Mine in Mingo County, West Virginia, and the Chilton Block No. 1 Mine in Logan County, West Virginia?

30(214) A. I also have charge of and direct the distribution of coal shipped to the Receivers from each of these three mines.

Q. Mr. Perry, by whom is the coal shipped to the Receivers by each of these mines, being consumed and used?

A. It is all consumed or used by the Receivers in the operation of the railroads in their possession and control.

Mr. PLUMMER. That is all my questions.

Cross-examination by Mr. EASER:

Q. As I understood the last question it was—by whom was the coal shipped and consumed from those three mines, and as I understand your answer, you only answered as to its consumption, the consumption of that coal?

Mr. PLUMMER. You answered as to both, did you not?

The WITNESS. The question was only as to consumption.

Mr. PLUMMER. Oh, yes. May I restate what I asked him? It was—"Mr. Perry, by whom is the coal shipped to the Receivers from each of these three mines, being consumed or used?"

The WITNESS. By the Receivers of the Seaboard Airline Railway in the operation of the railroads in their control or possession.

Mr. DELANEY. He didn't ask him who was shipping
30(215) the coal.

By Mr. EANET:

Q. Following that question, Mr. Perry, who ships the coal to the Receivers to be consumed in the operation of its railroad company?

A. From these three mines?

Q. Yes.

A. The Peerless Coal Company and Daniel H. Pritchard from the William Anne operation, and from Chilton Block No. 1.

Q. And from the Glamorgan Mine?

A. The Peerless Coal Company is the shipper who advises us of the shipments made.

Q. How is that done, by bill of lading or how?

A. How do they advise us?

Q. How do you advise them and how do they in turn advise you? What is the detailed transaction there, could you explain that?

A. These operators have instructions from our Purchasing Department to wire the Transportation Department of the Seaboard each day by Western Union wire, the number of cars of coal they ship to the Receivers.

Q. How is that confirmed? Is that wire later confirmed?

A. We later get a mail confirmation giving the
30(216) individual car numbers of those cars that are shipped on that day.

Q. What is that mail confirmation; is it a bill of lading?

A. No; that mail confirmation to the Transportation Department is simply a confirmation of the telegram, giving the numbers of the cars.

Q. Do you ultimately receive any other evidence of the shipment of that coal and the receiving of it, by the receivers of the railway company?

A. When that coal is shipped, as soon as that coal is shipped, it then becomes a Transportation Department responsibility, and we follow it up on the foreign lines to see that it comes to the Seaboard; follow it up to see that it goes to its proper bill destination and then is distributed to the districts over which it is supposed to go.

Q. Where does that destination appear in the records?

A. I don't believe I understand exactly what you are trying to get at.

Q. Is it on a dead-head billing or on a bill of lading?

A. All of this coal—all of these mines are located on other
30(217) lines than the Seaboard. It has to move over the other lines on regular revenue billing and up to its billed destination. When it is received by the Seaboard at

the junction point, our people make out the company bill that travels with the car until it is unloaded.

Q. Now let's get just a little more detail on that. Two of the mines are in West Virginia, that is the William Anne Mine and the Chilton Block No. 1?

A. Yes.

Q. Now that coal is billed with a regular bill of lading; am I correct?

A. Yes.

Q. And where is the junction point where that coal is transferred from that bill of lading from the other railway company or transportation company to your own line?

A. The Chilton Block is located on the C. & O. That coal reaches us at Richmond from the C. & O., at Richmond.

Q. Richmond, Virginia?

A. Yes; and the Richmond, Virginia, agency of the Seaboard rebills that coal on a Seaboard Company waybill. However, the original billing goes through to its billed destination, in addition to this company waybill. When the coal reaches its billed destination this through line billing is taken up and reported to the Accounting Department, and the company waybill follows the car until it is unloaded on the chute or disposed of.

30(218) Q. Is that the same with reference to the William Anne Mine? Only that the junction is different?

A. Yes. The William Anne Mine coal comes to us at Petersburg, Virginia, and Durham, North Carolina, and is handled in the same manner.

Q. Now, the coal from the Glamorgan Mine, is there another transportation facility other than the Seaboard Airline Railway used in its transportation?

A. Yes; the Glamorgan Mine is located on the Interstate Railroad and it moves up to Miller Yard, Virginia. It is there turned over to the Clinchfield Railroad, who bring it to the Seaboard at Bostick, North Carolina.

Q. Now, can you explain how the bill of lading is made out, if you can?

A. No; I guess I had better not attempt to explain that.

Q. Do you have any of those bills of lading here with you?

A. No.

Q. As I understand it, then, Mr. Perry, the bill of lading is prepared at the loading point where the coal is loaded?

A. I understand it is prepared by the railroad agent at the loading point or the nearest agency to the loading point.

Q. And it is shipped from the Peerless Coal or
30(219) Trichard to the Seaboard Airline Receivers at a destination over these foreign lines, through your lines, to its

stopping point, where it is consumed or used or where it is to be stored?

A. Yes.

Q. Is that through bill of lading received in advance or at the same time that the coal arrives at its ultimate destination?

A. I understand that it accompanys the coal.

Q. Then what is done with that bill of lading?

A. It moves with the car to its billed destination and then is reported by that agency at that billed destination to the Accounting Department to indicate the receipt on line.

Q. What I am trying to find out is, as a result of that bill of lading being forwarded to the Transportation Division at the point of destination, is it then inspected, is the coal inspected, to see that it conforms with the coal mentioned in the bill of lading?

A. That coal travels on railroad weights. That coal is weighed by the originating railroad.

Q. Where is it weighed?

A. Well, I can't say. I know the railroad weighs it. The coal that originates on the Interstate is weighed on the Interstate by a regular certified weighmaster.

30(220) Q. Where?

A. I don't know, but it has to be weighed before it can be billed to carry a certain amount of coal.

Q. Do you know where it is weighed for the William Anne Mine?

A. No; I don't.

Q. When you spoke with reference to the Interstate you referred to the Clamorgan Mine?

A. Yes.

Q. Do you know where it is weighed for the Chilton Block No. 1?

A. No, sir. The practice of course is to weigh all shipments of coal at the first scaling point that it passes.

Q. Is it weighed again?

A. Is it weighed again?

Q. Yes.

A. No.

Q. Is it inspected?

A. Oh, yes; our people have instructions—all of our coal chute foremen have instructions from our mechanical department that all coal is to be observed before it is dumped on the chute, to see that it is up to specifications.

Q. Now when that is done what comparison do they
30(221) use, the bill of lading?

EXAMINER CASTRELL. What was that question, Mr. Eanet, I didn't hear it.

MR. EANET. I will re-state it. He said that the coal foremen at the chutes inspect the coal before it is allowed to go into the chutes; isn't that right?

THE WITNESS. Yes.

MR. EANET. My question was, what means do they use to inspect that coal; is it based on this bill of lading that has accompanied the coal, or is there any other action or any other basis that they use for their inspection?

THE WITNESS. That comes under the jurisdiction of the Mechanical Department. However, I know that their basis of inspection is on the quality of coal that we are supposed to get as specified in the contract.

By MR. EANET:

Q. As specified in the contract?

A. As specified in the contract.

Q. Well, now, if I understand the contract, it specifies so many minimum and maximum tons in a month.

A. No; I mean as to quality, as to kind of coal.

Q. How about the quantity—set aside the quality 30(222) and tell me how the quantity is determined.

A. You mean by the coal chute foreman, the local coal chute foreman?

Q. Yes.

A. He only dumps coal on this particular chute as he needs it. He has nothing to do with how much coal has been ordered by the railroad.

Q. Mr. Perry, does the receiver through your department independently check and make an accounting of the coal received from these three mines, or do you accept the figures submitted by the operator?

A. Our department only checks the amount of coal shipped and received, on a car basis. The final accounting as to the amount of coal received, by tons, is up to the Accounting Department.

Q. Then if I am to understand your answer it is that your records are separate—and when I say "your" I mean the Transportation Division or Department of the Receivers of the Seaboard Airline Railway, that those records are separate from the records and independent of the records of the individual operators of these three mines?

A. Yes; the Transportation Department keeps no record of the amount of tonnage shipped by each of these mines.

Q. Do you know whether the records in your 30(223) Accounting Department are separate from and independent of, to your knowledge, the records of the operators of these mines?

A. I know that the Accounting Department keeps a record showing the tonnage shipped and received.

Q. You mean a separate record?

A. Yes.

Examiner CANTRELL. I am under the impression that the record shows that separate accounts are kept by the contractors and by the Receivers of the Seaboard Airline, that their accounting departments are separate and distinct.

By Mr. EXNER:

Q. Do you know the use to which the coal shipped from these three mines is put by the Receivers of the railway company in its operations as a common carrier?

A. I know that all of the coal shipped by these mines to the Receivers is used in connection with the operation of the railroads under their control.

Q. Can you divide that operation? Is it all used for locomotive consumption? I don't want to put words in your mouth.

A. No; it is used for locomotive consumption, stationary boiler use, operation of shop facilities, and everything in connection with the operation of the railroad. No distinction is made as to distribution except as to what territory it goes to.

Q. Do you know what part of that coal is used for any specific purpose?

A. No; all of it is used for all purposes.

Q. I understand. Have you broken that down or are there records available showing so many tons used for locomotive use, so many tons for stationary boilers, so many tons for power plants?

A. Oh, no.

Q. There is such a record though, to your knowledge?

A. I am not positive whether a record in that detail is kept or not. If it is, it is kept by the Accounting Department.

Q. I presume you were present during the hearing this morning, the morning session?

A. Yes.

Q. And you heard the witness, Mr. Gordon, testify that approximately 80,000,000 tons of coal are consumed by the railroad in a year?

A. Approximately 1,000,000.

Q. I beg your pardon, 1,000,000—and that approximately 50 percent of that coal comes from these three mines; is that correct?

A. Yes; I would say between 40 and 50 percent comes from these three operations.

30(225) Q. And with reference to the movement of this coal into the various states, as indicated by him in his testimony this morning, do you corroborate that?

A. I think he told you that I would have to answer that. He couldn't say.

Q. Then I understood that he did say it.

A. I understand that he has told you the states through which the Seaboard Railroad ran but didn't tell you the states in which this particular coal was used.

Examiner CANTRELL. We are becoming a little bit involved on understandings and misunderstandings. Is this pertinent, to your mind, Mr. Eanet, right now? I would suggest asking the witness the direct questions you want answered, and let's don't fill the record too much with things like that. Ask the witness the direct question that you want answered.

By Mr. EANET:

Q. In what states, in the operation of the railway company, is this coal used that comes from the three mines? If you can, state it as to the three different mines.

A. The coal from the William Anne operation and the Chilton Block No. 1 operation is ordinarily used in the States of Virginia, North and South Carolina; the coal from the Glamorgan operation is ordinarily used in the States of North Carolina, South Carolina, Georgia, and Florida.

30(226) Mr. EANET. That is all.

Examiner CANTRELL. Does the Legal Division have any further questions?

Mr. HARRINGTON. No.

Examiner CANTRELL. Mr. Meany?

Mr. MEANY. No.

Examiner CANTRELL. Mr. Eichelberger?

Mr. EICHELBERGER. No.

Examiner CANTRELL. Mr. Ansell?

Mr. ANSELL. No.

Redirect examination by Mr. PLUMMER:

Q. You referred in your testimony to this coal as being obtained from chutes. Just what do you mean by that, by chutes? What are they? Are they storage places where the coal is stored, unloaded, and put into and made available for the various uses, as needed by the Receivers?

A. Yes.

Q. That is what you mean?

A. I made mention of it being placed on the chute. I meant it was placed up on a chute so that it could be placed on locomotives at these coaling stations.

Q. The chute means a coaling station?

A. That is right.

Examiner CANTRELL. I would like to ask you one question on that. Does it sometimes happen, then, that the coal which was forwarded by the contractor to some destination on the route of the Seaboard Airline Railway itself is unloaded and then reloaded; or is it, the car itself, transferred?

The WITNESS. Ordinarily the coal moves in the same car from the mine and is dumped on to the chute to be put in the locomotives.

Examiner CANTRELL. Are there any occasions where the car is unloaded and stored and then reloaded on cars of the Seaboard Airline?

The WITNESS. Yes.

Examiner CANTRELL. Does that happen with any degree of regularity or is that very occasionally?

The WITNESS. We ordinarily maintain what we call a "protect supply" of coal on our line in case anything should happen that our supply would be cut off, so that we can continue to operate. We call those storage piles, that is, coal stored on the ground to be picked up and used as needed.

Recross-examination by Mr. MEANY:

Q. One question. Are there any so-called exchanges of coal at any intersection points with other carriers, at common loading chutes?

A. Yes; we have one or two.

30(228) Q. Are those exchanges made pursuant to the so-called General Managers Agreement?

A. I don't know. We have one or two common points where another railroad uses coal out of our chute.

Q. What is the procedure as to billing that other company for the coal, and could you tell me whether you know how much, in tons, was so exchanged or sold in 1936?

A. This particular coal from these three captive mines, you are referring to now?

Q. Yes.

A. I only recall one point which is——

Q. Just a minute. Do you commingle this coal from the so-called three captive mines, with coal purchased commercially, in these loading stations?

A. No. On further thought this particular point that I was talking about, we do not get coal from these captive mines there, the coal that goes to that chute.

Q. Does the Seaboard Airline bill the other carrier for such coal secured at those loading points, or at that particular loading point?

A. That is not from one of these captive mines, though.

Q. Regardless of whether it is or not, does the Seaboard Air-line Railway, or its receivers, charge anything for coal so delivered to other carriers?

30(229) Mr. COCKE. If it is regardless of this captive mine coal, we object to it on the ground that it is irrelevant and has nothing to do with the issues in this proceeding.

Mr. MEANY. The Seaboard Airline is a member of the Code.

Mr. COCKE. This isn't a general inquiry into all Seaboard practices. This is a question as to what happens to this particular coal.

Examiner CANTRELL. That is true. What was your objective, Mr. Meany?

Mr. MEANY. There has been no following and showing of tonnages shipped from these respective so-called captive mines to particular distinct points. There is nothing in the record to indicate whether or not some of this coal from the captive operations is delivered to loading points where exchanges are made with one or more other common carriers, and whether or not the Seaboard Airline as a Code member, sells coal to other lines, or does possibly make some sale of captive coal.

Examiner CANTRELL. Let's clear that up. This is my understanding from the previous testimony; that at a former date some coal from these three captive mines might have 30(230) been sold into commercial channels, but that as of the date of this hearing, and for some time prior thereto, no coal whatsoever is sold from the three captive mines in question; is that correct?

Mr. PLUMMER. Yes.

Mr. HARRINGTON. He is talking about sales by the railroad to other railroad companies.

Examiner CANTRELL. But not from these mines in question.

Mr. MEANY. That is what I want to find out.

Mr. HARRINGTON. He wants to know whether this coal is commingled and sold to other railroads.

Examiner CANTRELL. As I understand it, this witness has corrected the impression that he first gave by his testimony, to the effect that no coal was intermingled that came from the captive mines, with coal from other mines that was sold to other carriers or commercial users. There is no commingling; is that correct?

The WITNESS. Yes.

Examiner CANTRELL. Does that clear up the matter?

Mr. MEANY. May I ask, are you sure that none of the production of the so-called captive mines moves to any point where

there may be exchanges or sales of coal to other carriers pursuant to the so-called General Managers Agreement?

The WITNESS. To my knowledge, no.

Examiner CANTRELL. Does that answer your question, Mr. Meany?

Mr. MEANY. That is a definite statement, yes.

Examiner CANTRELL. Mr. Ansell, any questions?

Mr. ANSELL. No.

Examiner CANTRELL. Does the Consumers' counsel have any further questions of this witness?

Mr. EICHELBERGER. No.

Examiner CANTRELL. That is all, Mr. Perry.

Whereupon DANIEL H. PRITCHARD, called as a witness on behalf of the Receivers of the Seaboard Airline Railway, having been first duly sworn, testified as follows:

Direct examination by Mr. PLUMMER:

Q. Will you please state your name and residence?

A. Daniel H. Pritchard, Charleston, West Virginia.

Q. Mr. Pritchard, are you an officer of Chilton Block Coal Company, and if so what officer?

A. I am president.

Q. What title, or ownership, if any, has Chilton Block Coal Company in the coal being produced at Chilton Block Coal Company No. 1 Mine in Logan County, West Virginia?

A. They have none.

Q. What title or ownership, if any, have you individually in the coal being produced at this Chilton Block No. 1 Mine?

A. I have none.

Q. Do the Receivers of Seaboard Airline Railway Company or Seaboard Airline Company, the corporation, own or control any of the capital stock of Chilton Block Coal Company?

A. They do not.

Q. And the Seaboard Receivers or the Seaboard corporation, have they any representation on the Board of Directors of the Chilton Block Coal Company?

A. They have not.

Q. To your knowledge who owns the capital stock of the Chilton Block Coal Company?

A. Mrs. Pritchard owns the controlling stock.

Q. By "Mrs. Pritchard" you mean your wife?

A. Yes.

Q. Please state whether or not at the time the Seaboard Receivers acquired title to the coal at the Chilton Block No. 1 Mine, this particular mine had leased, I mean this particular 30(233) company, Chilton Block Coal Company, had leased the coal in this Dingess-Rum Coal Company?

A. (No answer.)

Q. I asked you the question at the time of this arrangement had the Chilton Block Coal Company leased coal in this mine from the Dingess-Rum Coal Company?

A. They had.

Q. Before the Seaboard receivers acquired title to the coal in this Chilton Block Mine, was the mine shut down or was it being operated?

A. The mine had been shut down for possibly ten or twelve years.

Q. Mr. Pritchard, under the terms of your lease of the coal in this mine from Chilton Block Coal Company, are you obligated or were you obligated, so long as you had a leasehold interest in that coal, to pay a minimum royalty for it?

A. We did.

Q. Can you state, Mr. Pritchard, what reasons prompted the Chilton Block Coal Company to approach the Seaboard receivers with the suggestion that the receivers acquire title to the coal in this mine?

A. This mine had been shut down for a number of years, and we had quite a number of houses that were empty and by leasing 30(234) this mine to the Seaboard Airline Railway, I saw an opportunity to recoup and reduce some of my costs of production at the other mine, Chilton Block No. 2 Mine. And further, to be compensated for the work that I was putting forth with the No. 1 Mine if I could lease it to the Seaboard Airline Railway.

Q. Did you have any market, or any commercial market for coal that you might have produced from the Chilton Block No. 1 Mine at that time?

A. The mine had been shut down for some years, Mr. Plummer, and whether or not there was a market I couldn't say because it had not operated since the time that I had taken over the ownership of it.

Q. Can you state whether or not the royalty paid by the Seaboard receivers on coal produced at this Chilton Block No. 1 Mine is paid by the receivers to or for the account of Chilton Block Coal Company, or to or for the account of Dingess-Rum Coal Company?

A. Paid for the account of Dingess-Rum Coal Company.

Q. Can you state whether or not at the time of these negotiations you were informed by the Seaboard receivers that the receivers would enter into the suggested arrangement only on the same general plan and general basis as at the William Anne Mine, and conditioned upon the receivers acquiring title to the coal in the Chilton Block No. 1 from the Dingess-Rum Coal Company, the fee owner?

30(235) A. It was my understanding that if the Seaboard did lease this mine, the Chilton Block No. 1, that the Chilton Block Coal Company would have no further interest in the coal known as the No. 1 Mine. It would be entirely the Seaboard Airline's property.

Q. I see. There is apparently some confusion as to the method of billing the coal, waybilling or issuing bills of lading for the coal produced at the William Anne Mine and at the Chilton Block Mine. I would like you to state, please, exactly how those shipments are handled from a waybilling and bill of lading standpoint?

A. It is rather different in both the C. & O. and the N. & W. mines. The coal billed from the N. & W. mine which was known as the William Anne Mine, is billed as far—I believe in your records you have shown here in this court that the coal is billed by the receivers for the Seaboard Airline Railway to the Receivers of the Seaboard Airline Railway.

Q. In other words, in the bill of lading the Seaboard receivers are shown—

A. That is billed on what we call a mine tag.

Examiner CANTRELL. A mine what?

The WITNESS. A railroad car tag. It is a white car tag and it shows the number of the mine, the date that the coal was loaded, the shipper and the consignee, and whether or not the coal should be paid, the freight should be paid or prepaid. And the coal is billed from the receivers of the Seaboard Airline Railway to the receivers of the Seaboard Airline Railway, to different destinations.

Examiner CANTRELL. Always designated in the bill?

The WITNESS. That is right.

By Mr. PLUMMER:

Q. Is the same practice followed with respect to the Chilton Block?

A. Practically the same, but we don't put those tags on the railroad cars, they are put in the box and picked up by the railroad conductor.

Q. In both cases are the receivers of the Seaboard Airline Railway Company shown in the bills of lading as being both the shipper and the consignee?

A. Yes; that is right.

Q. At both mines?

A. Yes.

Mr. PLUMMER. I have nothing further at this time.

Cross-examination by Mr. HARRINGTON:

Q. Mr. Pritchard, are you a producer of coal?

A. Yes; I am.

Q. Do you produce individually or in the name of a corporation?

A. Well, I have other mines.

Q. What other mines have you?

A. I have the Kanawha and the Chilton Block Coal Company.

Q. Any others?

A. That is all, sir. No, New Century Coal Company.

Q. Where is the Kanawha Mine?

A. In Kanawha County at Houston, West Virginia, on the Kanawha River.

Q. Is that close to the Chilton Block Mine?

A. About a hundred miles.

Q. And the other mine you have, how close is that to the Chilton Block?

A. Chilton Block No. 1 is within a mile of No. 2 Mine, which is operated by the Chilton Block Coal Company.

Q. And you are president of the Chilton Block Coal Company?

A. Yes.

Q. Does Chilton Block Coal Company pay you a salary?

A. Yes, sir.

Q. What is or was your total, or approximate total production for 1936 in all three of these mines?

A. A million tons.

Q. And the Seaboard Airline receivers take all the coal produced by the Chilton Block No. 1 Mine?

20(238) A. They do.

Q. Do they take the coal produced by the other two mines?

A. No, sir; they don't take the coal produced by the Chilton Block No. 2 Mine, either.

Q. Then there are three other mines besides this Chilton Block No. 1 that you have direct supervision over?

A. That is right.

Q. What is done with the Kanawha River coal?

A. The Kanawha River coal is a by-product coal, No. 2 gas coal. Chilton Block No. 2 is the same seam of coal as No. 1 Mine, Chilton Seam; and the New Century Coal Company is what is known as the Thacker Seam.

Q. What is done with that coal?

A. Sold commercially.

Q. Is the Chilton Block No. 1 a member of or have they accepted the Code?

A. They have qualified for acceptance.

Q. They haven't accepted?

A. No, sir.

Q. Have any of the other mines you operate accepted the Code?

A. They have.

Q. What business were you engaged in prior to 1934?

A. Automobile business and coal business, and
30(239) other business.

Q. Did you conduct a general sales agency for the sale of coal?

A. At that time I worked for the Central United Coal Company, which was a subsidiary of M. A. Hanna Coal Company, Cleveland, Ohio.

Q. Were you engaged in the general sales agency for the sale of coal?

A. I was.

Q. In that business did you sell coal to the Seaboard Airline receivers?

A. Personally I did not, but the Central United Coal Company did. I cooperated with our Norfolk manager in selling the Seaboard coal.

Q. When you approached them on this proposition of purchasing coal or entering into this contract of lease with the Chilton Block No. 1 Mine, did you consider that at that time, or did you approach them with the purpose at that time of selling them coal?

A. That was in 1935; sir.

Q. That is what I am talking about.

A. Yes, sir. At that time I was not with the Central United Coal Company.

Q. What were you doing then?

A. Operating these mines.

Q. I am asking you—Will you read the question,
30(240) Mr. Reporter?

(Whereupon the reporter read the question, as follows:)

"Q. When you approached them on this proposition of purchasing coal or entering into this contract of lease with the Chilton Block No. 1 Mine, did you consider that at that time, or did you approach them with the purpose at that time, of selling them coal?"

A. I approached them with the idea of leasing the mine to them, No. 1 Mine.

Q. You acted then as an agent for the Dingess-Rum Coal Company?

A. No, sir; I did not.

Q. You acted as president of Chilton Block?

A. I acted as an individual.

Q. You were president of the Chilton Block Mine at that time?

A. That is right.

Q. Did the Chilton Block Mine have a lease on Chilton Block No. 1 at that time?

A. They did.

Q. What was your proposition to the receivers of the Seaboard Airline at that time?

A. This mine had been abandoned and I asked them if they would be interested in leasing this mine and opening it up, and them taking the coal from the No. 1 Mine of Chilton Block Coal Company, which had been shut down for approximately ten years or more.

Q. Now what arrangements did you make in reference to the production of coal from that mine at that time, with the receivers of the Seaboard Airline?

A. That I could produce the coal from the Chilton Block Mine No. 1 for their account, for their sole account.

Q. Did you specify at that time what the price would be per ton for the coal produced on the Chilton Block No. 1 Mine?

A. When I first approached them?

Q. Or at any time thereafter.

A. Yes, sir.

Q. What price, do you remember, was set at that time?

Mr. PLUMMER. That is shown by the contract.

Mr. HARRINGTON. This witness knows it.

The WITNESS. I have several prices in my head. As close as I can remember it was \$1.37 $\frac{1}{2}$ a ton.

By Mr. HARRINGTON:

Q. That was in 1934?

A. Yes. Plus the royalty.

Q. What is the price you receive now for coal delivered to the receivers of the Seaboard from this Chilton Block No. 1 mine?

A. \$1.64 $\frac{1}{2}$ a ton, subject to adjustment, they paying the royalty of ten cents a ton.

Q. Do the Seaboard Airline Receivers have any control over your operations on the Chilton Block No. 1 Mine, in reference to your hiring and discharging the miners and buying supplies and equipment, and so forth?

A. They do not.

Q. You do all that on your own account?

A. I do. Further, you asked a question yesterday, I think, did I belong or did my mine belong to a union.

Q. I don't think I asked that question, but you can answer it now you brought it up.

A. I belong to the Operators' Association and I pay dues in the Operators' Association of Logan and Williamston. By belonging to this association they have a contract with the union, of which I am a member.

Q. What union?

A. United Mine Workers of America.

Q. I don't believe I asked that question.

A. Some one did; I thought I would clear it up in your mind.

Q. Now, Mr. Pritchard, in the operation of this Chiltern Block No. 1 Mine do you have houses that you rent to the miners?

A. I do.

Q. Do you operate a store on the premises?

30(243) A. I do.

Q. Do you sell coal out of that store or through the store?

A. To the store?

Q. Through the store.

A. No.

Q. You don't sell any coal?

A. Not through the store.

Q. Do you sell it at the mine?

A. To our employees only. The price is set by the United Mine Workers.

Q. Do you sell any coal to anybody else besides your employees?

A. I do not.

Q. Do you operate the William Anne Mine?

A. I operate it for the Seaboard Airline Railway Company, sir.

Q. I am asking you do you operate the William Anne Mine?

A. For the Seaboard Airline.

Q. But you are in charge of production of the coal of the William Anne Mine?

A. That is right.

Q. Do you operate that in the name of a corporation?

A. I do not.

30(244) Q. In your own name?

A. I do.

Q. Do you keep a set of books in your operation of that mine?

A. I do.

Q. Have a separate bank account?

A. Yes.

Q. Pay your employees?

A. I do.

Q. Buy all your own improvements?

A. I do.

Q. Does the Seaboard Airline Railway have any control over your operation of that mine?

A. They should have as far as our mining conditions are concerned, to see that I operate the mine in the proper way the mine should be managed, so we would get the proper recovery from the coal under the ground.

Q. You have a lease on that property, don't you, from the United Thacker Coal Company?

A. No, sir; I do not.

Q. You have a contract with the United Thacker Coal Company for the lease of the improvements, do you?

A. I do; yes. I pay them a rental.

Q. For what?

A. On the mining equipment and improvements on 30(245) the property.

Q. You don't think that you have a lease on the property of the William Anne Mine to take effect in the event that the lease held by the trustees or the receivers of the Seaboard Airline Company should terminate with the United Thacker Coal Company?

A. I do.

Q. How long does that lease run for?

A. I couldn't answer that question.

Q. You signed a lease and you don't know how long it runs?

A. I have so many leases that I really don't remember the exact time.

Q. I will try to refresh your memory.

A. All right.

Q. Does this lease run for a period of thirty years from the date of May 1, 1934?

A. I am going to say that I am ignorant on that question, but I will have my auditor—

Q. I will show you a copy of a lease which seems to be made between the United Thacker Coal Company and yourself.

Examiner CANTRELL. As an individual?

Mr. HARRINGTON. As an individual.

The WITNESS. Does that say thirty years?

30(246) Mr. HARRINGTON. Yes.

The WITNESS. My name is on there.

By Mr. HARRINGTON:

Q. Then it is for thirty years?

A. That is right.

Q. At the time you made this lease was there another lease made on the same day to the trustees of the Seaboard Airline Railway Company?

A. I don't remember, sir.

Q. Do you remember going to the Seaboard Airline Railway Company and interesting them in the William Anne Mine?

A. I do.

Q. Do you remember bringing these parties together, the Seaboard Airline trustees and the officers of the United Thacker Coal Company, for the purpose of making a lease?

A. I do.

Q. And do you mean that they didn't make a lease at that time?

A. No; I do not.

Q. Well, have you ever read this contract of lease?

A. Yes, sir.

Q. Well, isn't the lease made to the trustees of the Seaboard Airline company, made subject to your lease, or is
30(247) your lease made subject to their lease?

A. No; their lease is made subject to my lease. That is if Mr. Tynes, who is my counsel and also the vice president of the United Thacker Coal Company would not enter into a lease with the Seaboard Airline Railway for the period of time that they requested, so I possibly might say that I underwrote the lease. In the event that they gave up the lease then I would pick the lease up at that time and carry it on.

Q. As a matter of fact isn't it true, Mr. Pritchard, that Mr. Tynes wouldn't make this lease with the Seaboard until you did come in and make a lease which would be co-extensive with this lease and would take its place in the event that the Seaboard Airline receivers would pass out of existence or be merged with some other corporation?

A. I couldn't answer that question, but Mr. Tynes is here and he could answer it for you.

Q. I am asking you; I thought probably you would know that. You say you have a lease with the United Thacker Coal Company covering all of the improvements on the William Anne Property?

A. We have a lease on that; yes, sir.

Q. And you use that property in the production of coal under
30(248) your contract with the trustees of the Seaboard Air-
line?

A. Use the mining equipment, sir.

Q. As a matter of fact you can't take that equipment off and use it on any other property, according to your contract?

A. Not without the permission of the landlord.

Mr. HARRINGTON. That is all.

EXAMINER CASTRELL. Mr. Meany, do you have any questions of Mr. Pritchard?

By Mr. MEANY:

Q. In connection with the operation of the Chilton Block No. 1 Mine, and also the William Anne Mine, could you tell me how the equipment differs from the other mines which you own and operate commercially, that is, in so far as the preparation of coal for shipment differs? In other words do you, in either of these two operations, prepare coal in the same fashion that you prepare it at your other mines?

A. No, sir; we don't prepare it at any other mine like we prepare it at these two mines.

Q. What is the difference?

A. Well, in commercial mines, the mine on the Kanawha River, we ship byproduct coal and that is all straight run of mine coal.

Q. You are referring to byproduct coal?

30(249) A. Byproduct coal. In some instances we do screen the two inch lump and the two inch nut and slack, and divide them. At the New Century Mine we ship three different grades of coal, that is, two inch nut and slack, 2 x 5 egg, and 5 inch lump. At the Chilton Block No. 2 Mine we ship five grades of coal or we can ship more than five grades of coal, but we divide them into inch and a half slack, and 1½ x 3 stove, 3 x 5 egg, and a 5 inch lump, or we can make, by combining these different grades, any grade that is wanted up to a straight run of the mine.

Q. On both the Chilton Block No. 1 and the William Anne mines, are they equipped so that if the lease on either of the properties was terminated by the lessor, that you could continue mining and operating and supply coal to the commercial market?

A. That is true by making some improvements. We don't have the proper equipment there at the present time thus necessitating us to buy more equipment.

Q. Is the Chilton Block No. 1 operation one which you would consider comparatively high, the cost of operation?

A. No, sir.

Q. In connection with this securing of the lease by the Seaboard receivers from the United Thacker, and the
30(250) trustees of the trust mentioned, did you receive any remuneration from the Seaboard or from the United Thacker?

A. I did not.

Q. In reopening this No. 1 Mine which you say had been abandoned for a period of years, were there any advances to you of any monies by the Seaboard Airline Railway's receivers?

A. There was not.

Q. No financial assistance of any kind from the receivers of the railway?

A. Not unless you want to call—At times we have asked the Seaboard for advances on coal which belonged to them.

Q. In other words there never had been any money passed hands from the Seaboard, for which they were not adequately secured by coal already in their possession?

A. That is right.

Q. What was the production of the Chilton Block No. 1 Mine in 1936?

A. Would you object if I asked my assistant over there what it was?

Q. Well, whoever has the figures.

A. I can give you the approximate production of No. 1 Mine, 100,000 tons.

Q. What was the approximate production of the 30(251) William Anne Mine?

A. 240,000 tons.

Mr. MEANY. That is all.

EXAMINER CANTRELL. Mr. Ansell, any further questions?

By Mr. ANSELL:

Q. Mr. Pritchard, when did you first approach the receivers of the Seaboard Airline in respect to this operators' contract you have with them?

A. The early part of the year 1934.

Q. At that time you knew the Bituminous Coal Code under the N. R. A. was in effect?

A. Yes, sir.

Q. Did the production or the potential production of Chilton Block No. 1 Mine have a Code price?

A. Not that I remember, Mr. Ansell. Mr. McKellar can verify that if you wish. It was not in operation at that time.

Q. Did you draw the contract which was subsequently entered into between you and the receivers?

A. I did not.

Q. Did they draw it?

A. Between they and my counsel they did.

Q. The two counsel?

A. Yes; I would say so.

30(252) Q. Did you conduct all the negotiations leading up to that agreement?

A. Along with Mr. Nelson who was at that time connected with the Central United Coal Company, in charge of the Central United Coal Company's office at Norfolk, Virginia.

Q. Who represented the Seaboard or the receivers of the Seaboard in these negotiations?

A. Mr. Plummer, and others.

Mr. PLUMMER. You also conferred with both receivers, may I suggest.

The WITNESS. That is right.

By Mr. ANSELL:

Q. What induced you to approach the Seaboard Airline?

A. Well, I had a contract with the Seaboard on a similar proposition.

Q. For what mine was that other contract applicable?

A. The William Anne Mine.

Q. The William Anne Mine?

A. Yes, sir.

Q. What induced you to approach the Seaboard in respect to the William Anne Mine?

A. I was looking for some place to sell the coal.

Q. Did the William Anne Mine have a code price at the time you first approached the Seaboard?

30(253) A. It did.

Q. What was that price?

A. \$1.60.

Q. What was the price that was first paid you under your operator's contract?

A. Paid on a sliding scale basis.

Q. What was that basis?

A. It is on record here; I don't remember exactly what it was.

Q. Was it less than the Code price?

A. It was.

Q. Was that an inducement which you offered to the receivers to enter into this contract with you, that they were afforded a lower price than the Code price?

A. I couldn't answer that.

Q. Was that an inducement held out by you?

A. No.

Q. It was not held out?

A. No.

Q. Did you suggest that price?

A. Well, we bargained and traded on it.

Q. You suggested a higher price and they suggested a lower price.

A. You know the Seaboard Airline Railroad, don't you?

Q. That is all I have.

30(254) Examiner CANTRELL. Are there any further questions of this witness? If not, you may be excused.

Mr. TYNES. I am sitting here as Vice President of the United Thacker Coal Company and personal attorney for Mr. Pritchard, and in order that the record may be clarified I think he was asked the question as to whether or not in 1934 he made the arrangements with the Chilton Block Coal Company. The witness evidently thought the date was 1935. Ye replied yes, and the witness may perhaps want to correct the record and say that the Chilton Block arrangement was entered into about a year after the William Anne arrangements, the William Anne arrangement being made in April or May 1934, and the Chilton Block about a year after.

The WITNESS. July 1935.

Examiner CANTRELL. The witness desires to confirm the correction as offered by his counsel.

By Mr. ANSELL:

Q. On July 1935 you first approached the receivers of the Seaboard Airline in respect to Chilton Block No. 1?

A. I possibly could have approached them before that time.

Q. It wasn't before the end of May 1935 that you first approached them, was it?

A. I don't remember, Mr. Ansell.

30(255) Q. It could have been?

A. It could and it could not have been.

Q. But you just can't place it any more closely than that?

A. If you will permit me to ask my secretary—

Q. I just wanted to know from you, Mr. Pritchard.

A. I don't know.

Q. That is all.

Examiner CANTRELL. Are there any further questions of this witness? If not you are excused. Are there any further witnesses?

Mr. PLUMMER. We would like to have Mr. Tynes take the stand.

Whereupon BUFORD C. TYNES, called as a witness on behalf of the receivers for the Seaboard Airline Railway Company, having been previously sworn, testified as follows:

Direct examination by Mr. PLUMMER:

Q. Mr. Tynes, you heard Mr. Pritchard's testimony, in the course of which my recollection is that he stated that the United Thacker Coal Company, and Cole and Crane, trustees, informed him, Mr. Pritchard, that they would not make a lease
30(256) or the lease desired, to which the receivers of the Seaboard were willing to agree, unless the land owners

made a lease with Mr. Pritchard for their coal to take effect upon the termination of the lease of the land owners to the Seaboard. Can you state whether or not the landowners have imposed such a condition as that in their transactions with the receivers, or whether they told the receivers they would not make it?

A. I did not hear the testimony of Mr. Pritchard, but the landlord imposed no such condition as that on the receivers when we were negotiating with him; no.

Q. I would like to ask you was or was not that lease delivered simultaneously with a lease from the land owners to the receivers?

A. I think the leases bear the same date, but the lease to the receivers, the lease to Mr. Pritchard, is by express terms made subordinate to the lease to the receivers of the Seaboard, and by their terms and conditions it is expressly stated that it does not go into effect unless and until the principal lease to the receivers has terminated under its terms.

Q. In other words by its terms it is expressly made subordinate to the lease by the land owners to the receivers?

A. Yes; as I recall the execution and delivery of the two leases.

Q. Can you state whether or not the receivers had 30(257) any connection with the negotiation of that lease between the landowners and Mr. Pritchard?

A. None whatever that I know of. That was purely subjective matter with the two lessors, I might add.

Q. Can you state further whether or not the receivers, as far as your information goes, ever had any knowledge of any such conditions?

A. If the receivers had any knowledge of any such conditions as that, I don't know it. They didn't get it from me.

Q. Do I understand, Mr. Tynes, you to state that so far as your information goes, the receivers of Seaboard Airline Railway Company had no knowledge of the lease made by the landowners to Mr. Pritchard?

A. As far as I know they didn't know it until subsequently. Whether they ascertained it subsequently I don't know, but the receivers certainly had no knowledge as far as I know, and I think I should know, of the fact that subjectively the landlords, and when I say landlords I refer particularly to the United Thacker Coal Company who conducted the negotiations with the receivers, the receivers had no knowledge whatever of the fact that subjectively the United Thacker Coal Company was determined if it could to have somebody carry on at the termination of the lease to the receivers.

30(258) Mr. PLUMMER. That is all.

Examiner CASTRELL. Mr. Harrington, do you have any questions?

Mr. HARRINGTON. Yes.

By Mr. HARRINGTON:

CROSS-EXAMINATION

Q. Who was the first party that brought you in contact as an officer in the United Thacker Company, with the receivers of the Seaboard Airline?

A. I believe Mr. Dan Pritchard was the one.

Q. And your lease with the receivers of the Seaboard Airline Company is for the first period, or was, for the term of 24 months?

A. That is right.

Q. And then after that to be renewed?

A. A year at a time for four additional years.

Q. Why was it then that you insisted and wanted to make Mr. Pritchard a party, not a party to the lease with the receivers, but a party to a separate lease with you which would cover a term of thirty years?

A. I estimated at that time that there might be thirty years more worth of coal in the leasehold, and I wanted to assure continuity of the development of that coal, if possible. I knew the receivers would not in all likelihood mine the coal out in five years if they exercised the option they had to renew for that long period.

Q. Isn't it true that what you wanted was somebody to go on that property and produce coal?

A. Of course.

Q. And you didn't believe that this receivership might stay in existence for five years or any other length of time?

A. I had no right to assume anything or to believe anything, or even to forecast anything. It was just out of an abundance of Providence, I might say, that I wanted to work out some arrangement that would insure the removal of all that coal in that leasehold, which I estimated might require as long as thirty years.

Q. But you had more confidence in the financial stability of Mr. Pritchard than you did have in the receivers for the Seaboard Airline Company?

A. I would hardly say that. As a matter of fact I regard it as I stated here yesterday; the receivers as such I regarded as the best of landlords, because as long as the receivership certificates had a market I figured that the landlord would be paid

monthly as it has been, because it comes ahead of all other indebtedness of the railroad, of course. But from the standpoint of longevity, so to speak, our purpose in getting Mr. Pritchard to take this lease was to assure the mining of all that coal. I didn't know whether the receivers would renew the lease next year or not, or having renewed it the next year I didn't know whether they would renew it the next succeeding year, or for the four additional one-year periods. I knew that a very small percentage of the whole amount of coal would be mined out in the full five years.

Q. Now in the event that the receivers would be dissatisfied with the price that Mr. Pritchard is delivering this coal to them for, and they could buy their coal in the open market for a price less than Mr. Pritchard delivers it to them, they would be at liberty to go out and buy coal in the open market, and might terminate this contract with Mr. Pritchard. Then in that event you would look for the performance of this lease to Mr. Pritchard.

A. No; by the receiver for the remainder of the renewal period.

Q. For that year, but from that time on Mr. Pritchard would be the lessee of the property?

A. Not at all. The receivers might at the end of that year and before the 75 days expiration of that renewal year, decide to resume operations, and upon notifying us of their right to extend for another year, we were bound ab initio in my first contract by its terms.

30(261) Q. What I am trying to bring out is the fact that in the event that their lease terminated or was terminated by the receivers, that the lease which Mr. Pritchard has with you would come into existence, and he would be the lessee of the property?

A. At the end of the fiscal year for which they had last renewed, if the receivers did not exercise their right to renew. I might add that the lease would terminate, not through any positive act of the receivers but through their failure to extend it another year, and in that connection, Mr. Examiner, as a witness and as the draughtsman of that instrument also, I would like to quote into the record that clause of the lease so that the examiner—

EXAMINER CASTRELL. Is there any objection to that?

Mr. HARRINGTON. He has answered my question and that is all I wanted to know.

EXAMINER CASTRELL. Do you have any particular desire to introduce that clause into the record, Mr. Tynes?

Mr. TYNES. I think it might clarify the matter. Then I will know the Commission understands it as I do and as it is.

Examiner CASTELL. It is very short, isn't it, Mr. Harrington?

30(262) Mr. HARRINGTON. I don't know; it may be three or four pages long.

Mr. WITNESS. As I stated yesterday, and heretofore stated today in my examination, the United Thacker Coal Company, with Cole & Crane, trustees, leased to Mr. Pritchard the mining equipment upon the leasehold formerly known as the William Anne leasehold, for use in connection with the performance of his obligations to the Seaboard receivers, and that use exclusively. That included the loose equipment and the tippie, side tracks and other general mining equipment and improvements. That lease was embodied in an indenture of lease dated the first day of May 1934, which is divided into two parts. Part 1 evidences the leasing of this mining equipment for the purposes and uses just stated. Part 2 demises, leases and lets the exclusive right to enter upon this same William Anne leasehold for the purpose of mining and removing all the upper Thacker Seam of coal underlying said leasehold.

Examiner CASTELL. May I interpose one question. What is the date of the execution of the particular lease concerning which you are now testifying, Mr. Tynes?

The WITNESS. The date of the execution of this lease to 30(263) Mr. Pritchard, and the delivery, is subsequent to the date of the execution and delivery of the lease of the same property to the Seaboard receivers.

Examiner CASTELL. Would you mind for the purpose of the record giving the date of the execution and delivery of that lease that you hold in your hand?

The WITNESS. The date of the acknowledgment by the United Thacker Coal Company is the 13th day of July 1934; by the three trustees, the 14th day of July 1934, and by Daniel H. Pritchard, the 27th day of July 1934. I believe upon comparison it will be found that each of those acknowledgments respectively is subsequent to the corresponding acknowledgment of the lease to the Seaboard receivers.

Examiner CASTELL. And the lease was, as a matter of fact, delivered?

The WITNESS. Delivered manually several days—

Examiner CASTELL. Subsequent to the last date of execution of which you have testified?

The WITNESS. Yes. Now Part 2 of this lease is nothing in the world but our standard form of conventional lease of this William Anne leasehold for coal mining and development purposes in so far as the Upper Thacker Seam of coal is concerned. And among the conventional terms is the conventional period

within which to remove the coals, 30 years. Isn't that so, 30(264) Mr. Ansell, as compared with five years as the maximum in the case of the Seaboard.

Mr. ANSELL. It seems to me that if he is going to be allowed to draw up a lease and then read in certain portions, that I am going to have to insist that the whole lease go in evidence. I don't believe the witness should be allowed to pick certain parts of the lease and then describe other parts as being conventional or unconventional.

Mr. COCKE. Mr. Harrington brought this matter into the case and has asked Mr. Tynes a number of questions about this document. Now, we are interested in making it as plain as possible just exactly what, so far as this hearing is concerned, the provisions of this lease are which are germane to this case are. If Mr. Harrington wants to introduce the entire lease, that is his privilege, but he should not have the right to deny us the right to clarify it by having Mr. Tynes read into the record what we regard as the pertinent provisions and which he regards as the pertinent provisions.

Mr. ANSELL. It is true that Mr. Harrington did speak about the lease, but I am not representing Mr. Harrington's clients, but my own. I state it is contrary to every rule of evidence 30(265) that a witness be permitted to read into a record before any court those parts of a written instrument that he wishes to read, without introducing into evidence the entire document.

The WITNESS. If he wants to make a copy of it, the owner of this instrument will be very glad to let him do it.

Mr. HARRINGTON. This is the same thing as was brought out on direct examination, yesterday, that this lease was in existence between the United Thacker Coal Company and Mr. Pritchard, and if it is to be made a part of this record I asked yesterday that the instrument be introduced in evidence, but they objected to it on the ground it was too expensive because it is a large document.

Mr. COCKE. I don't recall that.

(Off the record discussion.)

The WITNESS. I would like the record to show, Mr. Examiner, that this lease from the two landlords to Mr. Pritchard, dated May 1, 1934, was duly recorded in the Office of the Clerk of the County Court of Mingo County, West Virginia, on October 10, 1935, in Bonds, Contracts, and Leases Book No. 27, page 412.

Mr. COCKE. That will probably be Exhibit 7. It is described as follows: "Indenture of Coal Mining Plant and Equipment Lease, Near Delbarton, Mingo County, West Virginia.

30(266) Being also coal lease at termination of lease of same date to receivers of Seaboard Airline Railway Company, United Thacker Coal Company, Cole & Crane, Trustees, Lessors, to Daniel H. Pritchard, Lessee." That is the Applicant's case.

Examiner CANTRELL. Do I understand, Mr. Cocke, that for the purpose of the record, and limited for the purpose of showing the execution of a lease subsequent to the lease from the United Thacker and Cole & Crane to the receivers of the Seaboard Airline Railway Company, you are introducing the lease from the United Thacker Coal Company and Cole & Crane Company, to Mr. Daniel H. Pritchard?

Mr. COCKE. And for, of course, the purpose of showing the document referred to is subject to the prior rights of the receivers of the Seaboard Airline Railway under their lease from United Thacker Coal Company and Cole & Crane, trustees.

Examiner CANTRELL. And for those purposes you will submit to the Commission a true and correct copy of the complete instrument?

Mr. COCKE. That is correct.

Examiner CANTRELL. Is that satisfactory?

Mr. ANSELL. So far as their case is concerned; yes.

Examiner CANTRELL. It will be received in evidence as Applicant's Exhibit.

30(267) (The document above referred to was received in evidence and marked as "Applicant's Exhibit 7.")

Examiner CANTRELL. Does anyone have any further questions of Mr. Tynes? Is that your case?

Mr. COCKE. That is the Applicant's case.

Mr. HARRINGTON. I have nothing further.

Mr. ANSELL. If the Court please I wish to move the introduction of the entire lease about which there has been controversy, on behalf of the intervenor in this case, District Board No. 8. I believe that the entire lease is pertinent to the subject of this hearing and I believe it all should be in evidence and be considered by the examiner.

Examiner CANTRELL. The entire lease will be considered by the Examiner. Those portions not offered by the applicant will be considered as offered by the intervenor; is there any objection to that?

Mr. COCKE. No.

Examiner CANTRELL. Are there any further proceedings in this particular hearing? If not it is concluded.

(Whereupon at 3:45 o'clock, P. M., the hearing was concluded.)

30(267)₂ [Reporters' certificates to foregoing transcript omitted in printing.]

30(268) UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION

Washington, D. C.

Docket No. 49-FD

30(269) Director GRAY. The hearing will please come to order. We will now proceed with the oral argument on exceptions to the Examiner's report taken by the Seaboard Air Line Railway Company, Docket No. 49-FD. This is a transcript of the order, to go in the hearing [handing document to the reporter].

(Said order is in the following words:)

UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION

Washington, D. C.

Docket No. 49-FD

In the Matter of the SEABOARD AIR LINE RAILWAY COMPANY
APPLICATION FOR EXEMPTION UNDER SECTION 4, II (1) OF THE
BITUMINOUS COAL ACT OF 1937

*Notice of continuance of oral argument on exceptions taken to
Examiner's findings of fact and recommendations*

Notice is hereby given, That oral argument on exceptions taken to the Examiner's Findings of Fact and Recommendation in the above entitled matter, heretofore noticed to be heard on the 22nd day of August 1939, in the Hearing Room of The Bituminous Coal Division, at the Walker Building, 734 15th Street, NW., Washington, D. C., is, for good cause shown, continued to September 12, at the same place, and commencing at the hour of 11:00 a. m.

Dated August 15, 1939.

H. A. GRAY, *Director.*

7933.

30(270)

Colloquy

Director GRAY. Is counsel for the applicant ready?

Mr. DELANEY. Mr. Director, I represent the Seaboard Air Line Railway Company. My name is William H. Delaney. Our assistant general counsel was to argue this matter; and through misunderstanding at least this hearing in our knowledge was set for 1 o'clock today.

Director GRAY. It is merely a typographical error. I will open the hearing and adjourn it until 2 o'clock.

Mr. DELANEY. I have phoned the airport, and they advise me that the plane gets in at 10:55. I have requested them to page Mr. Johnston and have him come here direct from the airport; so that it will only take him a few minutes.

Director GRAY. That will accommodate everybody.

Mr. DELANEY. If it is agreeable with you then that the hearing be withheld until then.

Director GRAY. Yes.

(Whereupon a recess was taken in this case from 10:05 until 11 o'clock a. m.)

(The following proceedings were had at 11:15 o'clock a. m.)

Director GRAY. The hearing will come to order. We will now proceed with the oral argument on the exceptions taken to the Examiner's findings of fact in Docket No. 30(271) 49 FD. In the Matter of the Seaboard Air Line Railway Company. Is counsel for the applicant ready?

Mr. JOHNSTON. Yes, sir.

Director GRAY. How much time will you take, Mr. Johnston?

Mr. JOHNSTON. I would like to ask what the nature of this proceeding is. Is this an ex parte proceeding or just what nature is it?

Director GRAY. Counsel for the Division expects to be here. I don't believe they intend to make any argument.

Mr. MILLER. No. We do not intend to make any argument.

Mr. JOHNSTON. I think I can make my statement reasonably brief. Let me ask you this previous to stating how much time we will take: Is the Director at all familiar with this record or with the exceptions?

Director GRAY. No.

Mr. JOHNSTON. Then it might take me a little longer.

Director GRAY. I will take the oral arguments and take the whole thing into consideration.

Mr. JOHNSTON. Let me put it this way: I will try to get through as nearly to half an hour as I can.

Director GRAY. All right. Are there any other interested parties?

Mr. FRENCH. My name is Robert H. French. I am appearing here for District Board No. 8. I would like to make a 30(272) statement for the purpose of the record when it is proper. I don't want to make any oral argument. I am not prepared to make any oral argument.

Director GRAY. How long a time do you think you will take?

Mr. FRENCH. Not over two or three minutes.

Director GRAY. All right, Mr. Johnston. Proceed.

Argument by Mr. Johnston

Mr. JOHNSTON. These are exceptions to the report made by the Examiner to the Coal Commission, as it was then, now transferred to this division. The facts in brief are that the applicants are receivers appointed by the Federal Court in the Eastern District of Virginia for the properties of the Seaboard Air Line Railway, a railroad operating in five states—Virginia, North Carolina, South Carolina, Georgia, Florida, and Alabama. The receivers were appointed by the court for the property of the railroad in 1930. They have been operating ever since. In 1934, pursuant to court orders authorizing them to do so, the receivers acquired coal in place at three mines. Two of the mines were acquired in 1934 and one in the early part of 1935, all pursuant to court orders. The mines so acquired, that is to say, the coal bought in place, are located two of the mines in West Virginia and one in the State of

30(273) Virginia. Those conveyances from the fee owners of the coal in place were for a term of years and provided for renewals, which have been made from time to time, and the renewals are now in effect. The Examiner made detailed findings as to the provisions of those contracts, and I don't think at this time that the detailed provisions are material. The effect was that the receivers acquired coal in place.

Contemporaneous with the execution of those or shortly after the purchase of the coal and the execution of this purchase agreement, the receivers made two contracts for the mining of coal for their account. One of those contracts was with a corporation, which mines the coal from the mine in the State of Virginia. The other contract was with an individual, E. H. Pritchard, who mines the coal for the account of the receivers at the two West Virginia mines.

The contract provided in substance or set up that the agents, in one instance the corporation and in the other an individual, shall mine the coal for the account of the receivers, load it in their cars and ship it in the name of the receivers to themselves at designated locations in the States of Virginia, North Carolina, and South Carolina. The contracts provide for payment of the agents on a basis of a fixed cost per ton. They are rather complicated instruments, however; and they have alternative provisions for payment either on a cost-plus basis or a fixed price basis; and they have various provisions for ad-

30(274) justment of the payments to the contractors in the event of increased social security or other fixed costs. The contracts, as I say, have been renewed from time to time; and are now in effect and will be in effect, as I understand it, about two more years pursuant to the last renewals.

Now, the contracts, that is, the purchase contracts with the fee owners, provide that the receivers shall pay the taxes on the coal in place. In one contract the receivers pay the land taxes direct to the state, and in another the royalty agreements include an amount sufficient to take care of the taxes referable to that coal, which are paid in turn by the fee owners. The tax levied under section 3-A, the one cent tax, is paid by the receivers.

All of the coal produced at all three mines is entirely consumed by the receivers in the operation of the railroad for locomotive coal. The coal is owned in place by the receivers; and, of course, when extracted is owned by the receivers. The title is in them, no title passing. No formal sale takes place between the agents who are operating the mines for the account of the receivers and the railroad. On those facts, that are undisputed, the Examiner declined to grant the exemption.

The exemption, as you know, under Section 4-L, provides that the code section 4, the code provision of the act,

shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him. And, of course, it is the position of the receivers that they are within the meaning of that section, producers of the coal by means of independent contractors, who are mining the coal which they own; and that clearly this is captive coal within the meaning and intent of the act, and should not be subject to the penalty provisions of Section 3-B.

The Examiner made findings containing a summary of the various contracts. Then he made findings that all the coal was consumed by the applicants; that there was no sale of it to any outside person, of any of the coal. He found on the contracts that the receivers were permitted to obtain for the coal in place minimum royalties aggregating about 29 to 30 thousand dollars a year. Then he found that the operators of the mines are independent contractors. He did not make any findings as to the ownership of the coal or as to the agency or relationship. He made no analysis of the relationship between the contractors and the receivers. He made no findings as to the existence or the nonexistence of sales or transfers of the coal. We think that findings as to those features are basic to a determination of the case.

The examiner concluded that it could not have been the intention of Congress to exempt this coal, primarily because of the large amount involved. He said that in view of the fact that there were a million tons involved in these mines, a million tons per year produced for consumption by the receivers, or that much potentially, that it could not have been the

intention of Congress to permit a situation whereby large consumers could acquire idle mines and produce coal for themselves under this kind of an arrangement. We think that the basic error in the case springs from that view that the Examiner had, because, of course, the basic question here is not that Congress did not intend to exempt this coal when the question here is whether or not under the express language of the Act the facts do not bring us within the exemption plainly stated by Congress.

There is no room here for a construction of the Act or an examination into what is the undisclosed intent of Congress when the plain language of the Act says that producers are exempt. Now, of course, the result of any price-fixing scheme or any rise in prices aside from any price-fixing scheme, is going to exclude large consumers from the production of coal for their own account as long as the cost of production is actually less than the price fixed either by market conditions or by governmental regulations. In reference to the authority under the Act,

30(277) a reference to the hearings will show, I think, on the question of this intention of Congress to exempt captive coal, if there is any room for the interpretation of the meaning of Congress—and I don't think that there is under the plain language of Section 4 L—I think that a reference to the hearings will show that no one contemplated that captive coal was a part of the problem which Congress was dealing with. Mr. Hosford, who was the chairman of the previous board, decided twice in hearings on the 1937 Act, the present Act, and he stated very plainly in these words: "Inasmuch as captive coal does not affect the commercial market, it has been disregarded." He said that repeatedly. He said in the second hearing with specific reference to railroads producing coal that where there is no sale, but merely production and use, then the Act would not apply. For that reason we think that it is perfectly plain that Congress, for the reasons given by the Supreme Court in the coal case, or a recent finding of the District Court approved by the opinion of the Supreme Court of the United States, that by reason of well-known conditions which gave rise to this legislation it is perfectly apparent that there was no need for and no intention to regulate merely the production of coal as such. The Examiner makes a statement in his report which we

30(278) think indicates the basis of the error that he fell into.

He said that Congress intended to regulate bituminous coal to the farthest reaches of its jurisdictional limits. I don't know exactly what that means, but I do know that under this law Congress intended to regulate not bituminous coal, not the activity of producing it, not the activity of transporting it, but

the commercial practices and price structure in the market place of bituminous coal. The whole viewpoint, the whole trend, the whole direction of this legislation under the present Act, of course, was given by the opinion of the Supreme Court in the Carter case. In the Act of 1935 Congress had attempted to regulate not only the commercial sales and the trade practices on the market place in coal, but had attempted to regulate the production to the extent of regulating the labor relations and the working conditions of the men in the mines; and the Supreme Court held those labor provisions invalid and said that it was unnecessary to pass upon the validity of the price-fixing provisions, because they were inextricably related and could not be separated. There was, of course, some very considerable dissent to that point.

However, Congress, responding to that decision, reenacted the law leaving out the labor and production control provisions, with the express purpose of raising the standards of labor and the working conditions in the industry, as well as the prosperity of the producers, by regulating the commercial price structure and the trade practices in the industry. So that we find the known and stated intention of the law from the very beginning was to regulate not the production of coal, not the labor relations involved in it, not the transportation of coal as such, but the commercial practices and prices. Now, that brings us, of course, to the crucial point in this case; and that is to say, Are the transactions in which the receivers here are engaged in having this coal produced by their agents for use on the railroad, are they commercial practices which fall within the regulatory provisions of this law; or are they, as we say, plainly merely an arrangement whereby the receivers are having their own coal produced for their own use, and are they not transactions which have not the remotest effect on the commercial price structure, on the trade practices in the industry? Are not they transactions clearly within the exclusion of Section 4-L of the Act?

Now, as to the basic question as to whether these transactions constitute commerce, the Examiner made no finding whatever. He did not say that coal or the getting and the production of this coal by the contractors for the receivers constituted a commercial handling of the coal; that it constituted an unfair trade practice in the coal industry. He did not make any findings whatsoever along that line. He merely said that he could not conceive that Congress could have allowed this much coal to be produced without wanting to regulate it. And in all the hearings upon which this legislation is based there was testimony as to the amount of captive production in America, both real and

potential. It was everywhere stated in the hearings, and, I think, plainly in the Act, that the captive production was out of it. So we come back to the question as to whether or not the facts of this case constitute this production a captive production; that is to say, whether this coal is being produced for the use of the producer, or whether it is being produced to be sold in the market.

The Examiner makes the statement that he thinks that Congress intended to regulate not only the sale, but the distribution of the coal. Well, none of the operative provisions of the Act itself contain the word "distribution." It appears in the preamble, but not in the actual legislative clauses. Insofar as it could be said that Congress intended by this Act to regulate the distribution of coal, it may be admitted that they intended to regulate the economic distribution of coal in the sense of distribution from the original owner or other owners or purchasers to the consumers. It is, or it may be, admitted that the railroad is engaged in the distribution of coal in a purely physical or geographical sense. But this is not a transportation act. No purpose of the act is involved in the regulation of a mere transportation of coal as such or the physical or geographical distribution of it. So we say that the Examiner's view that the Congress intended to regulate the distribution of coal is obviously inappropriate in this case, in which the only distribution which takes place is a physical one by the owner of it from the time it is in the ground until it is burned in the locomotives. Now, so far as is known, there is no congressional policy against self-sufficiency in industry or efficiency, and no policy against a large consumer who finds that he can produce coal at less than the market price going and buying that coal and then hiring somebody to dig it for him. The only possible distinction could be that here we have a person who is called in law an independent contractor rather than having a man who was on our pay roll. I think the Commission itself, the predecessors of this Division, has plainly recognized—and, certainly since, I think, the decision in the Indiana Coal Case, which appears to have been acquiesced in—that it is possible to produce coal by means of independent agencies and still come within the obvious intent and meaning of the exemption clause.

30(282) In the Northwestern Improvement Company case, which I believe was the last opinion rendered by the Coal Commission, or it is the last one that I have, the Commission on exceptions to the Examiner's report held against the exemption. In that case the Northern Pacific Railroad had a subsidiary corporation which was engaged generally in the pro-

duction and sale of coal in the market and also in the purchasing and sale of real estate, stocks, and bonds; in other words, was in many ways an entirely independent corporate and economic organization. The Commission, I think properly, held that the coal produced by that subsidiary and sold on bills of sale and formal accounting between the two, was not exempt under the provisions of Section 4-L. However, in arriving at that conclusion the Commission stated that in that case the applicant was a subsidiary corporation, and not the railroad, as in this case. They said, "The applicant does not produce coal for the railway in the capacity of trustee, agent, or independent contractor; but sells outright to it at arms'-length transactions."

Well, clearly, where we have a formal sale of the coal between separate corporations we have an entirely different question from the one that we have here. There we have a question as to whether or not the corporation is selling it, whether that is merely a formality that can be dissolved, or whether or not within the meaning of the Act the form which the parties choose to give the transaction should control, and the transactions be governed by the price-fixing provisions of the Act. Here the form of the transactions, or the realities of the transactions, both shew that this is production by the owner of this coal for his own use. It in no sense impinges in the price structure of the market. It is taken out of the market. It is not an economic factor in the calculations of the coal producers except so far as any captive tonnage must be. But the point here is that the Coal Commission has recognized that where coal is produced for the owner by an independent contractor as his agent, that would come within the meaning of the exemption provision. Now, that was the holding in the Indiana Coal Case. In that case the operator, the person who extracted the coal, was a subsidiary corporation of the St. Paul Railroad, or the Rock Island, I believe it was. The title to the coal itself—there had been some shifting in ownership. I believe it was originally purchased by the railroad and sold to the subsidiary corporation. Later it was sold to another subsidiary corporation and leased back to the applicant. Check me, Mr. Attorney, if I am wrong.

Mr. MILLER. You are quite right.

Mr. JOHNSTON. In any event, in that case the railroad did not own the coal, that is, not in its own name.

It was owned by another subsidiary of the railroad. However, the Seventh Circuit Court of Appeals held that an exemption must be granted, because the coal was being produced by that corporation for the railroad and as agent of the railroad. Now, in this case, the coal is owned in the ground by the receivers.

Director GRAY. Is that a fee simple ownership or on a royalty basis?

Mr. JOHNSTON. No. It is a royalty basis. The coal is purchased in place on a minimum production basis by the receivers. But under the West Virginia decisions, which we have here, it has been held that that is ownership of coal in place. In the testimony in this case before the Examiner the agents, both Pritchard and the officers of the company which is mining our coal in the Virginia mines, testified that they had no claim whatever or interest in either the property itself or the coal in the ground, none whatever. The fee owners are entirely different parties from the persons who are extracting the coal. In other words, the receivers owned it and by some means they went out and got somebody to operate the mines for them. So that there can be no charge or imputation here of a system whereby in purchasing coal from the owner we have tried to set it up under some other form of transaction.

30(285) **Director GRAY.** I was merely trying to get the facts of this matter. Your contract for the coal does not compel you to take the coal except certain amounts of the coal?

Mr. JOHNSTON. Well, they are very substantial. They are something like ten thousand tons a month.

Director GRAY. Can the railroad company under such conditions cancel their contract and not take all the coal?

Mr. JOHNSTON. No. It has to take up to the minimum.

Director GRAY. In any one year?

Mr. JOHNSTON. Yes. In any one year. And the contracts are now renewed for a period of two years.

Director GRAY. Will this minimum take all the coal out of the ground that is in the contract?

Mr. JOHNSTON. I could not answer that.

Mr. DELANEY. They are very large tracts, Mr. Director; and, of course, in one year we could not exhaust the coal in that land. Perhaps it would be fifty or sixty years.

Director GRAY. So in effect it is an option on the coal, isn't it?

Mr. DELANEY. No. It is more than that.

Mr. JOHNSTON. The courts have held that it is more than that. It is an interest in the coal in the ground.

Mr. DELANEY. It is an absolutely exclusive lease. No person can mine any of that coal, not even the fee owner itself, while these contracts are in effect.

39(286) **Director GRAY.** Under your contract you are not compelled to take all of that coal under certain conditions?

Mr. JOHNSTON. No, sir. We could not take it all. It would be physically impossible for anybody to take it all.

Director GRAY. Well, in time?

Mr. JOHNS-TOX. Well, yes. No.

Director GRAY. I just wanted to get that.

Mr. JOHNS-TOX. The contracts are in a familiar form, I think, in the coal fields. There have been a number of decisions as to the title and as to the interests of the parties in this kind of a conveyance. In the case here which was cited in the brief of exceptions on page 17 there are two West Virginia cases cited which show the attitude of the West Virginia courts as to that title. They say that under a conveyance of this type, which is nominally a lease in some respects, they say that, "The fee owners carved out of the fee a particular estate and vested it in another. The instrument of conveyance gave certain title to produce certain personal property, a product of the land." We can say this with certainty: There may be a good many legal facets to the ownership here from the standpoint of the relationship of the receivers to outsiders; but as between the receivers and the fee owners and the agents who are digging the coal, the receivers own the coal. The people who are digging the 30(287) coal, these contractors, these agents that we have hired to dig the coal, have not the slightest interest in the coal. They have no interest in the land and had none to start with, and have no interest in the coal now.

Director GRAY. I don't want to take too much time on that. I just want to get what this relationship to the coal is.

Mr. JOHNS-TOX. I think it is more important to clarify the facts in your mind than it is to make an argument. I think that the facts are determinative of the case. The question is whether or not this is a bona fide captive operation. In the language of the man in the street that is what the question is. Is this a captive mine, or are we in the market buying coal under some other form of transaction? We say that there can be no doubt on that, that there absolutely is only one answer to it. And the Examiner did not make any answer to it. He made no finding as to who owned this coal. He merely said that by his own interpretation of the intention of the Act he didn't think that Congress intended to let this much coal be produced in this way. We don't agree with him.

Now, that question as to the ownership of the coal—and I am glad that you asked the question, because I think it is basic—on that we say that since we own this coal, and since the receivers are the officers of the court that have been authorized by 30(288) the court to incur this very substantial obligation, to buy this coal in place—that is finally what it amounts to—

as I say, the minimum that they have to pay for coal is something around \$30,000 a year—they have expended their money, the money of this trust estate, for that purpose under specific court orders directing them to go and buy this coal in place and produce it for the use of the railroad in order to save the receivership estate money that they would have to pay if they went into the market. Now, that is in its very essence the kind of transaction that this Act expressly exempts from the regulatory provisions.

Then we come down to this: Suppose that it is finally held that the operation is not exempt. What would we do? You would come to the receivers and say, "Here your agent is producing coal up there and shipping it in your name, and it is your coal. He has no interest in it. You are paying him an amount for his labor, calculated either on a cost basis or a cost-plus basis, under the contract." Now, there is a code in effect, and prices have been fixed by the provisions of that code; and I say that this coal—

Director GRAY. No. That is not correct.

Mr. JOHNSTON. I mean, I am projecting this into the future. I say, I am calling attention to what the situation will be if the Division should hold that there is no exemption 30(289) here. How could you enforce the price-fixing provision and make the receivers pay a price for coal which they already own? Certainly as between the person who is digging this coal and the receivers, and as far as that is concerned, as against anybody in the world, the receivers own this coal the minute it is extracted, and before, as far as that is concerned. They own the coal. Now, it might be said, or we could say, we could fix a value for that coal. But the value has been fixed by the contract, and the receivers own this coal. It would be impossible from a mechanical standpoint to enforce a price-fixing provision. Of course, the price will reflect the value of the coal as well as the value of the services in getting it out and the services in selling it.

Well, there are no services in selling this coal. It is not sold. There are no salesmen. It would be impossible to reflect a value for the coal dug in a price which the owner of the coal would have to pay. So that in effect a holding here that this coal is not exempt would be to say to the receivers, "You can only produce your coal out of the ground at a certain cost. We are just going to raise your cost of production and make you pay your agents and employees a certain amount for producing the coal." 30(290) And that is not the intention of Congress and nobody says that it is. It seems so plain that where the re-

ceivers themselves own this coal, and nobody denies their ownership of it, that it cannot possibly be a case falling within the operative code section or the penalty tax section, of course, which applies only where a person who otherwise would be subject to the code refuses to join the code and recognize the price structure. We inevitably come back here to the ownership of this coal and the means whereby the receivers produce that coal, within their own good business judgment and that of the United States court approving the exercise of it.

There is no substantial difference as far as the commercial markets of America are concerned, as far as the price structure in the coal business is concerned, between the production in this case, which is done by these receivers by their own employees, and people put on their own pay roll, and by employees of independent contractors, persons skilled in the business of mining coal, who are employed by the receivers to hire actual coal miners to do the digging. In either case the coal goes to and is entirely consumed by the locomotives of the railroad. None of it gets into the market. None of it is reflected in any sales contract either formal or informal. And in every instance it is coal produced by the owners for their own use.

30(291) We therefore say that the Examiner clearly fell into error in recommending that the exemption be not granted. Now, there are several subsidiary questions which I don't care to go into, because I want to emphasize the basic considerations in this case, and that is the ownership of this coal and the absence of any commercial transactions or sales or transfers of title which would give something for the Act of Congress to grasp, to attach itself to, to operate on. There is just nothing there for this Act to operate on. An analysis of the situation will make it plain that there is nothing for Congress to operate on here, nothing that it has attempted to operate on; and therefore we are plainly within the meaning of Section 4-L, which exempts coal produced by producers for their own use.

Director GRAY. Is this contractor here, Pritchard, in any other business or occupation?

Mr. JOHNSTON. I think he is. Yes. I am not sure about it. This gentleman here would know. I believe that he operates another mine. Doesn't he?

Mr. DELANEY. He operates several mines. He is also in the automobile business. He is a very wealthy man.

Director GRAY. You mentioned the corporation and said that they operate one of these mines too.

Mr. DELANEY. That is the Peerless Coal Corporation, which operates the Glamorgan Mine in Wise County, Virginia.

Director GRAY. Other than your own?

50(292) Mr. DELANEY. No, sir. This is the corporation that is operating our mine.

Director GRAY. The mine under your control?

Mr. DELANEY. It is not operating any other mine. No, sir. It is not a mine owner.

Director GRAY. How is their profit fixed?

Mr. JOHNSTON. Under the contract it is fixed at a certain number of cents per ton over and above the cost of producing it. It is a bonus basis.

Director GRAY. Do they provide the capital for the pay rolls?

Mr. JOHNSTON. The capital comes from the receivers' money. They provide the capital in the sense that they provide the coal-mining machinery to begin with. But the whole capital is put up by the receivers, and it comes from the current payments that are made.

Director GRAY. The receivers advanced the capital in the first place?

Mr. JOHNSTON. Yes, I understand so.

Director GRAY. As to both of these operations, they advanced the capital?

Mr. JOHNSTON. No. It did not advance it in the beginning. But the operations from time to time, of course, are paid from the funds—there is testimony in here, I believe, in the record, 30(293) is there not, that the pay rolls and so on are met by the current payments from the receivers. I think both parties have independent capital. I am not sure as to the Peerless Coal Mining Company. But the record shows that Mr. Delaney is more familiar with that phase.

Mr. DELANEY. Mr. Director, the Peerless Coal Corporation has no other business; and while it did not get its original capital from the receivers, it draws on the receivers from week to week. Payments are made to it each week. In fact, if it wants money, it can get it and does get it occasionally, twice a week. For instance, there were occasions when the receivers paid the power bill for them. They preferred to have it handled that way, because the power bills were running up, and they wanted them paid on time.

Director GRAY. How is the ownership vested in this coal company, this Peerless Company? Who owns it? Is there anything in the record as to the ownership of that company?

Mr. DELANEY. As to the ownership of it, do you mean?

Director GRAY. Yes. The stock ownership.

Mr. DELANEY. Its stock ownership is in Mr. Walter C. Shunk. I think that is his name. He is the sole owner.

Mr. JOHNSTON. He is the operator.

Director GRAY. He owns all the securities and the bonds and stock?

Mr. DELANEY. Yes.

30(294) Director GRAY. And Pritchard is an individual?

Mr. DELANEY. Pritchard is an individual. Now, he does operate other mines. For instance, he operates the New Era Coal Company. But that is an entirely different mine in an entirely different field. That has no relation whatsoever to this. He is just a man of extensive interests.

Director GRAY. Does he charge anything personally for his services in your pay rolls? Does he charge a salary in the costs?

Mr. DELANEY. Yes; I should say that he does. For instance, he perhaps does not charge it to us directly as a salary charge, but the operation of this scheme is that he sets up a budget from year to year, which includes a compensation to himself.

Mr. JOHNSTON. That is the way he does it.

Mr. DELANEY. And he presents that to the receivers. There is also attached to the contract what is known as Exhibit B, under which certain increases in cost, legitimate increases in cost, are presented to the receivers at the end of the year; and the receivers reimburse Mr. Pritchard for those expenditures. For instance, I will take one case, that of mine props. Mr. Pritchard makes a budget for the year. He tells the receivers that

30(295) their coal is going to cost them so much a ton. During that year the cost of mine props goes up, say, five cents each. At the end of the year Mr. Pritchard goes to the receivers and he says, "The mine props cost more than we calculated on, and therefore you must reimburse me for that increased cost of mine props;" and the receivers do.

Director GRAY. Are any of the employees of this coal company or Mr. Pritchard's employees engaged in any of these other activities? For instance, does Mr. Pritchard charge anything to your account for part of the salary of other employees?

Mr. JOHNSTON. No, sir.

Director GRAY. Bookkeepers or mine superintendents or engineers that might work part time on this and part time on the other mines?

Mr. DELANEY. No, sir. His mine force is engaged solely in the production of coal for the receivers. The receivers have al-

ways insisted that that operation be kept separate and apart from any of his other operations.

Director GRAY. There are no engineer fees charged in there, where the engineers or people might be employees of Mr. Pritchard in his own mines or of Mr. Shunk in some of his operations?

Mr. DELANEY. In the case of Shunk, I should say no. In the case of Mr. Pritchard I cannot answer the question, because he is a man of such extensive interests that for the 30(296) sake of economy he might charge only a portion, we will say, of a consulting engineer's fee against the William-Ann mine.

Director GRAY. It would be possible that he could charge certain of his employees against this operation and have them spend some time on some of his other operations and thereby reduce his other operations by that amount, could he not?

Mr. DELANEY. No. I don't think so, because all of his accounts are audited by the receivers' accountants from time to time.

Director GRAY. All right. Go ahead. I just wanted to get some facts. I am not familiar with the record.

Mr. JOHNSTON. Are there any other questions that you want to ask? I think the record is here. Mr. Delaney is more familiar with it than I am. If there are any other questions——

Director GRAY. No. I have no other questions. Are any of the facts in answer to those questions in the record? Do you know, Mr. Delaney? Have those things been touched on?

Mr. JOHNSTON. I believe that everybody testified. I think that Mr. Pritchard testified. I wasn't there at the original proceeding——

Director GRAY. It may be in the record.

Mr. JOHNSTON. But I think that the testimony as to the method of handling the contracts is pretty complete in 30(297) the record. There is one other thing that I might mention. This set-up originated shortly after, I think, the N. R. A.; and was submitted to Mr. Richberg, and approved by him as a basis for the lease and operation by the receivers. That is in the record, and there was correspondence on it.

Director GRAY. Have you finished?

Mr. JOHNSTON. Yes.

Director GRAY. Do you want to speak, sir?

Statement by Mr. French

Mr. FRENCH. Mr. Director, for the record I would like to explain our position in opposing this application. We have been engaged

constantly since the filing of the exceptions in this case in other matters. They were filed, at least they were served on us, by letter dated August 29, 1938, upon Mr. Ansell, who appeared at the hearing before the Examiner on behalf of District Board No. 8. During the week preceding, on August 21, 1938, the District Board No. 8 had approved and sent out to code members of the district minimum price schedules as required by order of the Commission issued shortly before that. This order of the Commission required that prices be proposed to the Commission under Section 4-II-a not later than September 6th. During the period August 22 to September 6 the Board received criticisms of the schedule published

August 22. The number of these criticisms was approximately 400. In their examination of these criticisms the

Board officers and technical employees used continuously the services of other counsel, Mr. Ansell. After September 6th counsel prepared the submission of these prices to the Commission in conformance with the statute and with the orders of the Commission. From that time to October 19th counsel for the Board was engaged at all times in preparing the case of the Board for the hearing commencing on the latter date. Counsel participated in the hearing commencing October 19th until its close about December 1st. Besides active participation in the hearing, a brief of approximately 75 pages was submitted to the Commission on behalf of the Board by counsel on November 21st. After that the Board continued to receive and consider criticisms against its proposed prices and necessary proposed findings; and acting upon a large number of these, approximately 30, at its December 21st meeting. Now, counsel for the Board participated in the consideration of all these protests by the technical staff of the Board. During this period counsel frequently conferred with the officers of the Commission's legal division with reference to procedure to be adopted after the approval by the commission of Section 4-II-a prices.

30(299) After prices were approved on January 19th, counsel actively participated in all coordination proceedings from that date until the close of coordination in the latter part of March. Thereafter counsel commenced the preparation of District Board No. 8's case upon 4-II-b prices, and assisted the legal division of the Commission in outlining the procedure of the Commission until about June 30th. During this period in May counsel spent approximately ten days traveling to and from Denver to participate in the 4-II-b hearing at that place. Since July 24th counsel has attended the hearing of the Division upon the 4-II-b prices. For that reason Mr. Ansell has been con-

tinuously and actively engaged in other matters before this Board. He has not therefore been able to prepare a brief or to prepare for oral argument in this case. Not only that, but there are other matters actually pending before this Division at the present time. And because of Mr. Ansell's engagements, and although the Board does not operate on a budget, but is limited in its expenditures, they have found it necessary to employ additional counsel. They have brought me into this matter. For instance, I have just been down at a hearing at Lexington, Kentucky, on certain exemptions by the coal company.

There will be another hearing set for September 19th. 30(300) In fact, it is now set for September 19th, a week from today. That is a hearing in Youngstown, Ohio, in which District Board No. 8's appearance has been entered. And, of course, the price schedule hearing is still continuing, and will no doubt be in session during September 19th, and for quite some time. It means, consequently, that Mr. Ansell has not had the opportunity, nor have I, to prepare any oral argument. We therefore at this time ask the Director for leave to file a brief. We ask it for this reason: Rather than come in and ask the Director to continue this matter entirely because of the delay until the Board Commission hearing is concluded, we will endeavor to undertake to present our views in a brief. We feel that it is important to justify this action. I make this lengthy explanation so that the Director will understand that it is not through neglect or oversight that we have not been able to present a brief before this, but because we have not physically been able to do so. Now, I think that in view of the Price Board hearing now going on and the hearing on September 19th at Youngstown, we should require about thirty days; and I will ask leave to file a brief on behalf of District Board No. 8 in thirty days, or, say, by October 15th.

Director GRAY. I think that is too long. You will 30(301) have to cut it down.

Mr. FRENCH. I am explaining the circumstances. It is not being asked because of the fact that we want to delay it, but we are engaged in pressing matters of the Board. I have personally a matter in the Federal Court in Cincinnati. I have this hearing on September 19th. There are other matters that we are called upon for. And we just cannot, on account of the budget, go out and employ one lawyer after another. It would be physically impossible for him to start in and acquire knowledge of this case. So it seems to me that we are not asking an unreasonable time in asking for thirty days. If we could get

it in before that, we will certainly do so. I don't see how the applicapts can be injured, because they are exempt as it is now. So that I see no harm to anyone if we are granted thirty days.

Mr. JOHNSTON. I think that is true. But what is the position of the District Board? Are they properly participating in the hearing? Are they interested? What position are they going to take?

Mr. FRENCH. The District Board has filed a petition of intervention, which has been granted by the Examiner. I suppose it means simply that where the District Board are the co-producers under the Act, if this exemption is granted, it will naturally affect us and the code members represented 30(302) by us. We believe that the application should not be granted.

Mr. JOHNSTON. You mean that the District Board wants to have the contributions from Mr. Pritchard in his operations?

Mr. FRENCH. I don't say that at all.

Mr. JOHNSTON. I think that thirty days is a little long, because after the District Board files its brief, apparently if they are opposing our application for exemption, then we will have to have some time to reply. It is going to run it out. It seems to me that the Examiner has everything before him that is necessary for him to decide the case. The District Board took no testimony in the case. It did not participate in the taking of testimony. I don't know that the Division needs any more briefs. There have been a whole lot of briefs filed. I think the Division can decide the case on the record that is now before it.

Director GRAY. I will grant you two weeks for a brief. I suppose that you will want to answer it?

Mr. JOHNSTON. Yes, sir. I would like to have two weeks to reply to it.

Director GRAY. All right. I will give this gentleman two weeks, and then I will give you two weeks to file a brief in reply.

Mr. JOHNSTON. Maybe we will not want to file a 30(303) brief. If so, we will advise you.

Director GRAY. You may suit yourself on that. Have counsel anything further to say?

Mr. MILLER. No. I am satisfied with our record.

Director GRAY. Are there any other parties in the room who wish to say anything?

(No response.)

Director GRAY. I will take this matter under advisement and adjourn the hearing now.

(Whereupon, at 12:15 o'clock p. m., the hearing was closed.)

THIS DEED OR LEASE, Made this 12th day of July, 1934, by and between Glamorgan Coal Land Corporation (hereinafter called "Lessor"), a corporation under the laws of Virginia, of Wise, Wise County, Virginia, party of the first part; and Legh R. Powell, Jr., and Henry W. Andetson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Lessees"), parties of the second part:

Whereas, the Lessees are desirous of acquiring from the Lessor the sole and exclusive right and privilege, during the term or period hereinafter mentioned and of any extension or renewal thereof hereinafter provided for, of mining coal from the veins or seams of coal in, upon, or under the tracts or boundaries of coal lands, or coal rights, and surface rights, hereinafter mentioned, and of manufacturing coke thereon and therefrom, and selling said coke and coal and, as incident to such right, the further right and privilege of contracting with an independent contractor (hereinafter called the "Contractor") for the service and work of mining, manufacturing, transporting, and loading said coal at the mine tipples on railroad cars for the Lessees, the Contractor to use and employ in the performance of said service and work all the buildings, tipples, and other structures, and all equipment, machinery, improvements, and appurtenances (hereinafter collectively called "improvements") owned or leased by the Contractor and located on said tracts or boundaries of land, and necessary or convenient for the performance by the Contractor of said service and work; and

Whereas, the Lessor is willing to grant in and by this Deed of Lease such rights and privileges to the Lessees upon the terms, conditions, and provisions hereinafter set forth.

Now, therefore, in consideration of the sum of \$1.00 paid by the Lessees to the Lessor, the receipt of which is hereby acknowledged, and the performance and observance by the Lessees of the terms, conditions, covenants, stipulations, and agreements hereinafter set forth and on the part of the
 36 Lessees to be performed and observed, it is agreed by and between the Lessor and the Lessees as follows:

First

The Lessor hereby leases to the Lessees, their successors and assigns, for the purpose of mining coal and manufacturing coke thereon and therefrom, and selling said coal and coke, the following property, to wit:

All those certain tracts or boundaries of coal lands, or coal rights, and surface rights, near the Town of Wise, Wise County, Virginia, which are bounded and described in that certain Deed of Lease bearing date on the 17th day of July 1902, made by and between O. M. Vicars and Mecca Vicars, his wife, and J. J. Kelly, Jr., and E. J. Kelly, his wife, and Stonegap Colliery Company, and which tracts or boundaries are, in said Deed of Lease, numbered from One (1) to Eighty-seven (87), inclusive, and were in and by said Deed of Lease, and for the purpose of mining coal and manufacturing coke thereon and therefrom and selling said coke and coal, leased to said Stonegap Colliery Company, its successors and assigns; Excepting and Reserving. However, from this lease to the Lessees hereunder the surface of those certain following tracts of land originally included and leased in and by said Deed of Lease dated July 17, 1902, but in and by agreement dated November 4, 1930, between Glamorgan Coal Land Corporation (the Lessor hereunder) and said Stonegap Colliery Company excepted and reserved from said Deed of Lease dated July 17, 1902; said tracts or boundaries of land the surface of which was so excepted and reserved from said last-mentioned Deed of Lease, and the surface of which is excepted and reserved from this lease to the Lessees hereunder, being tracts numbered Twenty-four (24), Twenty-five (25), and Thirty-eight (38), respectively, in said Deed of Lease dated July 17, 1902. Said Deed of Lease dated July 17, 1902, is of record in the Clerk's

Office for Wise County, Virginia, in Deed Book No. 60, 37 pages 131 to 216, both inclusive, and said agreement dated November 4, 1930, is of record in the Clerk's Office for said County in Deed Book No. —, pages — to —, both inclusive. Reference is here made to said Deed of Lease dated July 17, 1902, and to said agreement dated November 4, 1930, and to the record thereof, for a detailed and more certain description of the several tracts or boundaries of lands, coal rights, and surface rights in and by this Deed of Lease leased to the Lessees hereunder.

Second

This lease shall take effect as of July 17, 1934, and shall continue for the period or term of one (1) year thereafter, subject to renewal, at the election of the lessees, on the same terms and conditions, as hereinafter set forth.

Third

For all coal mined by the Lessees, or by the Contractor for the Lessees' account, from the veins or seams of coal in, upon, or

under the said tracts or boundaries of coal lands, the Lessees will pay to or upon the order of the Lessor a rent or royalty of ten cents (10c) per ton of 2,000 pounds.

For each month of the twelve months beginning July 17, 1934, and for each month of each year after July 17, 1935, of any extension or renewal of this lease, the Lessees will pay to the Lessor as a minimum monthly rent or royalty for coal so mined, the sum of One Thousand (\$1,000) Dollars per month whether coal of that amount be mined or not, which sum is the product derived by multiplying the minimum of 10,000 tons of 2,000 pounds of coal which the Lessees agree to direct the Contractor to mine for their account during each month of each year of the continuance of this lease, by ten cents (10c) per ton: Provided, However, that said minimum monthly rental or royalty shall be reduced by a sum equal to the product derived by multiplying by ten cents

38 (10c) per ton of 2,000 pounds the aggregate number of tons of 2,000 pounds under 10,000 tons, if any, which the Lessees through no act or fault of their own, shall not have caused to be mined from said leased premises during said month: Provided Always, However, that the minimum monthly rental payable hereunder shall in no event be less than Seven Hundred and Fifty (\$750.00) Dollars; and Provided, Further, that in the event of the termination of this lease pursuant to any of the provisions herein (except for default of the Lessees hereunder) or by mutual consent of the parties hereto, prior to the expiration of any one month of the then current lease year, the monthly minimum rental due and payable by the Lessees hereunder shall be such proportion of said above specified minimum monthly rental as the portion of such month during which this lease shall at the time of such termination have continued in effect shall bear to one (1) month.

All rentals or royalties payable by the Lessees under this lease shall be paid monthly to or upon the order of the Lessor and on or before the twenty-fifth day of the month next succeeding the month for which such rentals or royalties become due hereunder.

If the coal mined by or for account of the Lessees during any one month computed at ten cents (10c) per ton of 2,000 pounds shall not amount to the sum of One Thousand (\$1,000) Dollars, then the Lessees, provided they shall have paid the said minimum monthly rental or royalty due and payable by them for such month hereunder, shall have the right to mine, or cause to be mined, from the leased premises, free of rent or royalty, sufficient coal to make up the amount of such minimum rent or royalty paid for such month in excess of the coal mined during such month computed at ten cents (10c) per net ton.

All coal necessary for the use and operation of the machinery used for the mining of the coal and the manufacturing of coke on the leased premises, and all smithing coal necessary on the premises, shall be free of royalty.

39 Rents or royalties payable by the Lessees hereunder (other than said minimum rent or royalty) on or in respect of coal mined and shipped from the leased premises shall be in accordance with the weights furnished by the initial carrier, and Lessees shall, on or before the fifteenth day of each month, furnish or cause to be furnished to the Lessor a report showing the quantity of coal so mined and shipped during the month immediately preceding, giving the car numbers and weights furnished by the initial carrier for all such coal which is shipped by rail. The quantity of coal mined from said leased premises which is not shipped and on or in respect of which rent or royalty shall be payable hereunder, shall be ascertained in a manner satisfactory to the Lessor, and Lessees will render all reasonable assistance and cooperation in the actual ascertainment and report of the coal mined from said leased premises, whether shipped or not shipped, and of the rent or royalties due thereon.

Fourth

If the Lessees shall fail for thirty (30) days to pay the royalty, or any part thereof, as herein provided for, in the manner, or within the time hereinafter provided for, then the Lessor may, at its option, treat this lease as forfeited and cancelled, and may reenter the said leased premises and repossess themselves of the same as of their former estate therein.

Fifth

The Lessees shall keep, or cause to be kept, books of accounts of mining, using and shipping of coal mined hereunder, and said books shall be open at all reasonable times for inspection of the Lessor, its agents or attorneys, or other persons in its behalf, for the purpose of comparing and verifying the reports rendered by the Lessees under Article Third hereof, or for obtaining information as to the mining, using, and shipping of said coal during any period.

40

Sixth

The Lessor, its agents, engineers or other officers or other persons in its behalf, with its assistance shall have the right to enter at all times the mine or mines on the said leased premises, whether below or on the surface of the ground, in order to

inspect, examine, survey, or measure the same or any part thereof, or for any other lawful purpose; and for those purposes to use freely the means of access to the said mine or mines, without hindrance or molestation.

Seventh

The Lessor shall pay all taxes and assessments that may be levied or assessed against the lands or other real estate in and by this lease to the Lessees.

Eighth

Lessor makes no covenant of title with respect to the coal lands, coal rights, and surface rights in and by this Deed of Lease leased to the Lessees further than this, that is to say, Lessor will at its own cost and expense defend all suits or actions that may be instituted against the Lessees or the Contractor by third parties affecting the title to said coal lands, coal rights, and surface rights, and the Lessor will indemnify and save harmless the Lessees against any and all judgments (including court costs and attorneys' fees) that may be procured against the Lessees or the Contractor in any such suit or action: Provided, Always, that if the Lessees should be dispossessed by a third party or parties of any part of parts of said coal lands, coal rights, or surface rights and the Lessees thereby be prevented from the practical and economical extracting, mining, and removal of the minimum of 10,000 tons of 2,000 pounds of coal per month which the Lessees agree to direct the Contractor to mine, produce, and load for their account during the twelve months beginning July 17, 1934,

and for each year after July 17, 1935, of any extension or
41 renewal of this lease, the Lessees shall have the right, upon the payment of all rents and royalties accruing or due to the date such dispossession occurs, to terminate this Deed of Lease and to be no further bound by any of its terms and provisions.

Ninth

Should the plant of the Contractor located on the leased premises become incapacitated for work or operation by reason of fire, or from some providential cause, the payment of the minimum royalty required under this lease shall be suspended until such time as the necessary repairs or rebuilding can be reasonably done.

Tenth

All rents or royalties which may at any time be owing to the Lessor under this agreement shall constitute, and are hereby

constituted and declared, a first and paramount lien upon the premises and properties embraced in this lease.

Eleventh

If at any time during the continuance of this lease the Contractor should be prevented from operating the plant located on the leased premises for account of the Lessees, on account of or by reason of general labor strikes prevailing throughout the Wise County, Virginia, coal field, or by reason of failure on the part of any railroad company or companies after ten (10) days' notice by the Lessees to furnish, without fault on the part of the Lessees, sufficient transportation, then, and in either of such events, the minimum royalty provided for in this lease shall be abated until such time as the two causes aforesaid shall have been removed; Provided, However, that in no event shall anything in this lease be construed as releasing the Lessees of and from the payment of any amount except the amount equivalent to the difference between the coal actually mined and the amount of said minimum royalty; and Provided, Further, that there shall in no event be any abatement from said minimum royalty for either or both of the causes mentioned in this Article 42 for a greater length of time than three (3) months altogether.

Twelfth

The Lessees shall have the right to use, or permit the Contractor to use, all timber owned by the Lessor, upon the leased premises, which is less than fourteen (14) inches in diameter outside the bark, measured three (3) feet above the surface of the ground, at the time same is wanted to be used and which may be reasonably necessary in connection with the operation of extracting, mining, manufacturing, transporting, and loading said coal or in connection with the operation of the plant of the Contractor or for use by the Contractor in building or repairing houses on the leased premises, etc.

Thirteenth

It is understood by and between the parties hereto that the Lessor is the owner of several tracts of surface which were conveyed to it by O. M. Vicars and wife and J. J. Kelly, Sr., and wife by deed dated August 18, 1927, which deed is of record in said Clerk's office in Deed Book No. 186, pages 271, etc., and to which deed and the record thereof reference is hereby made, and which tracts of surface are not included in said Deed of Lease dated July 17, 1902, or in said agreement dated November

4, 1930, but which over lie certain tracts of coal contained in the said Deed of Lease dated July 17, 1902. It is agreed by and between the parties hereto that the Lessees and the Contractor are hereby released from any and all damages which may result to said several tracts of surface, and also to said above-mentioned tracts of surface numbered 24, 25, and 38 (originally included in said Deed of Lease dated July 17, 1902, but excepted and reserved from this lease), or any or either thereof, or to any part thereof, by reason of the removal of any or all subjacent or lateral support thereto, and that the Lessees are hereby given and granted (and the contractor in the performance of his said contract with the Lessees hereunder shall also have and possess) the right to pass in, under, through, and over each and all of said several tracts of surface, including said tracts of surface numbered 24, 25, and 38, described in said Deed of Lease dated July 17, 1902, and all of which said tracts of surface are excepted from this Deed of Lease, and each thereof, for the purpose of mining and removing any and all the coal embraced and included in this Lease.

Fourteenth

In the event the agreement between the Receivers and the Contractor providing for performance by the Contractor during the year beginning on July 17, 1934, of the said service and work of mining, producing, and loading said coal for the Receivers, or any extension or renewal of said agreement coextensive with any extension or renewal of this lease, shall be terminated by the Lessees by reason of the breach or default thereof upon the part of the Contractor, the Lessees, provided they shall have paid to the Lessor all rents or royalties that shall then have accrued to the Lessor hereunder, may, if the Lessees so elect, terminate this lease upon the expiration of fifteen (15) days' written notice to the Lessor of such election, and upon such termination of this lease the Lessees shall be absolved from any and all further obligations under this Lease.

Fifteenth

This lease shall, at the option of the Lessees, be renewed and extended from year to year, not exceeding an aggregate period of four (4) years from July 17, 1935, upon and subject to the same terms, conditions, covenants, stipulations, and agreements herein contained, subject to the payment of the same rentals and royalties herein provided for; provided sixty (60) days' prior written notice of the intention of the Lessees to so renew or extend this lease shall be given by the Lessees to the Lessor.

The provisions of this lease shall extend to and bind the Lessor, its successors and assigns. Subject to any right to cancel or terminate this lease as provided herein or as given by law, the provisions of this lease, so far as they are applicable to the Lessees, shall be binding upon, and shall inure to the benefit of, the Lessees (as Receivers of Seaboard Air Line Railway Company, but not individually) and their successors, the Seaboard Air Line Railway Company and its successors, the railroad corporation which may, after the termination of the receivership of Seaboard Air Line Railway Company, succeed the Receivers in the possession of substantially all the lines of railroad comprised in the receivership estate of Seaboard Air Line Railway Company, and the successors of such railroad corporation.

The receivership wherein the Receivers are receivers shall not be terminated, nor the receivership thereunder surrendered, by the Receivers or their successors unless as a condition of such termination or surrender, all the obligations of the Receivers, then existing or to accrue under this lease, shall be assumed by Seaboard Air Line Railway Company or other corporation that shall succeed the Receivers in the possession of substantially all of the lines of railroad comprised in the receivership estate. In case of a sale or conveyance of substantially all of said lines of railroad the purchaser or transferee of the purchaser shall not be at liberty to refuse to accept this lease, or to disaffirm it, but if acquiring substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose of reorganization, any such purchaser shall not incur any personal liability on or in respect of this lease, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume all the obligations of the Receivers under this lease existing at the time of such sale or thereafter to accrue hereunder. In case
45 any corporation prior to the expiration of the term or period of this lease, or of any extension or renewal thereof, shall succeed the Receivers in the possession and operation of substantially all of said lines of Railroad (whether Seaboard Air Line Railway Company or any corporation formed for the purpose of reorganization, or any other corporation) and shall assume all the obligations of the Receivers then existing and to accrue under this lease, the Receivers shall thereupon be relieved from all further liability under or in respect of this lease.

In the event of such termination or surrender, Seaboard Air Line Railway Company, or other corporation, as the case may be, acquiring said railroads, shall enter into a written covenant direct

with the Lessor whereby Seaboard Air Line Railway Company, or such other corporation shall assume all the obligations then existing and to accrue of the Receivers under this lease, and thereupon Seaboard Air Line Railway Company, or such other corporation, shall be substituted for the Receivers under this lease with the same effect as if named herein as lessee hereunder.

Seventeenth

This Lease is executed in two counterparts, each party hereto holding a counterpart thereof, and each of such counterparts shall be deemed an original.

Witness the following signatures and seals of the parties hereto, as of the day and date first above written.

GLAMORGAN COAL LAND CORPORATION,

By O. M. VICARS, *Its President*,

LEGH R. POWELL, JR.,

[SEAL]

HENRY W. ANDERSON,

[SEAL]

As Receivers of Seaboard Air Line Railway Company.

Attest:

J. J. KELLY, JR.,

Secretary.

46 STATE OF VIRGINIA,

County of Wise, ss:

I, C. H. Holyfield, a Notary Public in and for the County aforesaid, in the State of Virginia, do certify that O. M. Vicars and J. J. Kelly, Jr., whose names are signed to the writing hereto annexed bearing date on the 12th day of July 1934, have acknowledged the same before me in my County aforesaid.

I further certify that the said O. M. Vicars and J. J. Kelly, Jr., in the name and on behalf of Glamorgan Coal Land Corporation, a corporation, before me and in my County aforesaid acknowledged the said writing as the act and deed of the said corporation; and made oath that they are President and Secretary, respectively, of the said corporation, and that the seal affixed to the said writing is the true corporate seal of the said corporation, and that it has been affixed thereto by due authority.

Given under my hand this 13th day of July 1934.

My term of office expires March 5, 1935.

(s) C. H. HOLYFIELD,

Notary Public.

STATE OF VIRGINIA,

City of Norfolk, ss:

I, M. E. Carroll, a Notary Public in and for the City aforesaid, in the State of Virginia, do certify that Legh R. Powell, Jr.,

whose name is signed to the writing hereto annexed, bearing date on the 12 day of July 1934, has acknowledged the same before me in my City aforesaid.

Given under my hand this 18 day of July 1934.

My term of office expires March 4, 1936.

(s) M. E. CARROLL.

Notary Public.

STATE OF VIRGINIA.

City of Norfolk, ss:

I, M. E. Carroll, a Notary Public in and for the City aforesaid, in the State of Virginia, do certify that Henry W. Anderson, whose name is signed to the writing hereto annexed, bearing date on the 12 day of July 1934, has acknowledged the same before me in my City aforesaid.

Given under my hand this 18 day of July 1934.

My term of office expires March 4, 1936.

(s) M. E. CARROLL.

Notary Public.

I hereby certify that the foregoing is a true and correct copy of agreement No. 23781 dated July 12, 1934, as executed between Glamorgan Coal Land Corporation and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN.

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

49 *Comptroller's Contract No. 23781-1*

THIS SUPPLEMENTAL AGREEMENT, Made this 1st day of April 1935, by and between Glamorgan Coal Land Corporation (hereinafter called "Lessor"), a corporation under the laws of Virginia, of Wise, Wise County, Virginia, party of the first part; and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Lessees"), parties of the second part; witneseth that

Whereas, the parties hereto have heretofore made and entered into that certain Deed of Lease dated the 12th day of July 1934, whereunder the Lessor has leased to the Lessees, their successors and assigns for the purpose of mining coal and manufacturing coke thereon and therefrom and selling said coal and coke, all those certain tracts or boundaries of coal lands, coal rights, and surface rights near the Town of Wise, Wise County, Virginia, in said Deed of Lease (and by reference therein to that certain Deed of Lease dated July 17, 1902, and to that certain agreement dated November 4, 1930) more particularly described; and

Whereas, under said lease the Lessees have, and have exercised, the right and privilege of contracting with Glamorgan Coals, Incorporated, as an independent contractor, in and by agreement dated July 10, 1934, for the service and work of mining, manufacturing, transporting, and loading said coal at the mine tipples on railroad cars for the Lessees, the Contractor using and employing in the performance of said service and work all the buildings, tipples, and other structures, and all equipment, machinery, implements, and appurtenances owned or leased by the Contractor, located on said tracts or boundaries of land and necessary or convenient for the performance by the Contractor of said service and work; and

Whereas, said Deed of Lease dated July 12, 1934, is for a term or period of one (1) year from and after July 17, 1934, renewable at the option of the Lessee from year to year, not exceeding an aggregate period of four (4) years from July 17, 1935, upon and subject to the same terms, conditions, covenants, and stipulations therein contained, and subject to the payment of the royalties therein provided for, upon sixty (60) days' prior written notice from the Lessees to the Lessor in said Deed of Lease provided for, and is for an initial period, renewable as above stated, which is coextensive with the initial and renewal periods of the said agreement of the Lessees with said contractor; and

Whereas, the Lessees and the contractor, subject to the execution and delivery of this agreement, in and by agreement bearing even date herewith, have supplemented, modified, and amended their said existing agreement dated July 10, 1934, in certain particulars, and wherein and whereby said agreement dated July 10, 1934, between the Receivers and the contractor is renewed and extended for the period of three (3) years from and after July 17, 1935, upon the same terms and conditions, except as and to the extent said terms and conditions are in and by said supplemental agreement supplemented, modified, and extended, and with the right in the Lessees at their option, unless

said agreement dated July 10, 1934 (as so supplemented, modified or amended) shall be terminated prior to July 17, 1938, under or by virtue of any of the provisions thereof, or of said supplemental agreement, to extend and renew said agreement for a further period of one (1) year from July 17, 1938, to July 17, 1939.

Now, therefore, in consideration of the premises, of the sum of One Dollar (\$1.00) paid by the Lessor and the Lessees, each to the other, the receipt of which is hereby acknowledged, and in further consideration of mutual benefits and of the covenants and agreements hereinafter contained, the Lessor and the Lessees do hereby covenant and agree as follows:

1. That said Deed of Lease dated July 12, 1934, is hereby, by mutual consent and agreement of the Lessor and the Lessees, renewed and extended for a period of three (3) years from and after July 17, 1935, and until July 17, 1938, upon the same terms, conditions, covenants, stipulations, and agreements therein contained, except as and to the extent said terms, conditions, covenants, stipulations, and agreements are in and by this agreement expressly supplemented, modified, or amended.

2. That the first four (4) paragraphs of Article Third of said Deed of Lease dated July 12, 1934, are hereby amended or modified so that on and after April 1, 1935, and during the period beginning on that date and ending on July 17, 1938, during which said Deed of Lease dated July 12, 1934, as herein supplemented, modified or amended, shall continue in force, said paragraphs shall provide as follows:

"For all coal mined by the Lessees, or by the Contractor for the Lessee's account, on and after April 1, 1935, from the veins or seams of coal in, upon, or under the said tracts or boundaries of coal lands, the Lessees will pay to or upon the order of the Lessor a rent or royalty as follows:

"(i) For each month in which the actual cost per ton of 2,000 pounds to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal on railroad cars as in said agreement dated July 10, 1934 (as supplemented, modified, and amended by agreement dated April 1, 1935), between the Receivers and the Contractor provided, shall equal or exceed the sum of One Dollar and Thirty-two Cents (\$1.32), a rent or royalty of Eight Cents (8c) per ton of 2,000 pounds;

"(ii) For each month in which the actual cost, referred to in the next preceding subdivision (i) of this Article, to the Contractor shall be less than the sum of One Dollar and Thirty-two Cents (\$1.32) per ton of 2,000 pounds, a rent or royalty of Ten Cents (10c) per ton of 2,000 pounds.

52 "Actual cost to the Contractor, as used in this Article, shall relate to and mean such actual cost as computed, determined, and ascertained, and subject to adjustments upward or downward, in conformity with the provisions of paragraph numbered 7 of said agreement between the Receivers and the Contractor, as supplemented, modified, and amended by said agreement dated April 1, 1935. It is agreed that as and when, and as often as, audits are made by the Lessee's accountants for the purpose of ascertaining such costs, Lessees will promptly furnish Lessor with a statement (certified as to its correctness based on such audit by the accountant or accountants making such audit) of such actual cost to the Contractor as ascertained by such audit, and that any actual overpayment or underpayment of rent or royalty by Lessees to Lessor, or its assigns, developed by such audits shall be promptly adjusted in subsequent settlements between Lessees and Lessor, or its assigns.

"(a) For and during each month of the period beginning on April 1, 1935, and ending on July 17, 1938, that this lease, as supplemented, modified, or amended by agreement dated April 1, 1935, between Lessor and Lessees, shall continue in force and for which month the rent or royalty of Eight Cents (8¢) per ton shall apply hereunder, the Lessees will pay to the Lessor as a minimum monthly rent or royalty for coal so mined, the sum of Eight Hundred (\$800.00) Dollars per month, whether coal of that amount be mined or not, which sum is the product derived by multiplying the minimum of 10,000 tons of 2,000 pounds of coal which the Lessees agree to direct the Contractor to mine for their account during each month of each year of the continuance of said lease, by Eight Cents (8¢) per ton;

53 "(b) For and during each month of the period referred to in the next preceding subdivision (a) hereof that this lease, as so supplemented, modified, or amended, shall continue in force and for which a rent or royalty of Ten Cents (10¢) per ton shall apply hereunder, the Lessees will pay to the Lessor as a minimum monthly rent or royalty for coal so mined, the sum of One Thousand (\$1,000.00) Dollars per month, whether coal of that amount be mined or not, which sum is the product derived by multiplying the minimum of 10,000 tons of 2,000 pounds of coal which the Lessees agree to direct the Contractor to mine for their account during each month of each year of the continuance of said lease, by Ten Cents (10¢) per ton;

"Provided, However, (i) that said minimum monthly rent or royalty, payable under subdivision (a) of this paragraph hereof shall be reduced by a sum equal to the product derived by multiplying by Eight Cents (8¢) per ton of 2,000 pounds the aggre-

gate number of tons of 2,000 pounds under 10,000 tons, if any, which the Lessees through no act or fault of their own, shall not have caused to be mined from said leased premises during said month, and (ii) that said minimum rent or royalty payable under subdivision (b) of this paragraph hereof, shall be reduced by a sum equivalent to the product derived by multiplying by Ten Cents (10c) per ton of 2,000 pounds under 10,000 tons, if any, which the Lessees through no act or fault of their own, shall not have caused to be mined from said leased premises during said month; Provided Always, However, that the minimum monthly rental payable hereunder shall in no event be less than Six Hundred (\$600.00) Dollars; and Provided, Further, that in the event of the termination of this lease pursuant to any of the provisions of this lease (as so supplemented, modified, or amended), except for default of the Lessees hereunder, or by mutual consent of the parties hereto, prior to the expiration of any one month of the then current lease period, the monthly minimum rental due and payable by the Lessees hereunder shall be such proportion of said above specified applicable minimum monthly rental as the portion of such month during which this lease shall at the

54 time of such termination have continued in effect shall bear to one (1) month.

"All rentals or royalties payable by the Lessees under this lease shall be paid monthly to or upon the order of the Lessor and on or before the twenty-fifth day of the month next succeeding the month for which such rentals or royalties become due hereunder.

"If the coal mined by or for account of the Lessees during any one month for which the rent or royalty of Eight Cents (8c) per ton shall apply hereunder, computed at Eight Cents (8c) per ton of 2,000 pounds, shall not amount to the sum of Eight Hundred (\$800.00) Dollars or if the coal so mined during any one month for which the rent or royalty of Ten Cents (10c) per ton shall apply hereunder, computed at Ten Cents (10c) per ton of 2,000 pounds, shall not amount to the sum of One Thousand (\$1,000.00) Dollars, then, in either of such cases, the Lessees, provided they shall have paid the said minimum monthly rent or royalty due and payable by them for such month hereunder, shall have the right to mine, or cause to be mined, from the leased premises, free of rent or royalty, sufficient coal to make up the amount of such minimum rent or royalty paid for such month in excess of the coal mined during such month, computed at Eight Cents (8c) per net ton, or at Ten Cents (10c) per net ton, as the case may be."

3. That effective on and after April 1, 1935, and for the period during which said Deed of Lease dated July 12, 1934, as herein supplemented, modified, or amended, shall continue in force, Article Eleventh of said Deed of Lease is hereby supplemented, modified, and amended so as to provide as follows:

"If at any time during the continuance of this lease the Contractor should be prevented from operating the plant located on the leased premises for account of the Lessees, on account of or
55 by reason of general labor strikes prevailing throughout the Wise County, Virginia, coal field, or by reason of failure on the part of any railroad company or companies after ten (10) days' notice by the Lessees to furnish, without fault on the part of the Lessees, sufficient transportation, then, and in either of such events, and as often as such events, or either of them, shall happen, the minimum royalty provided for in this lease shall be abated until such time as the two causes aforesaid shall have been removed; Provided, However, that in no event shall anything in this lease be construed as releasing the Lessees of and from the payment of any amount except the amount equivalent to the difference between the coal actually mined and the amount of said minimum royalty; and Provided, Further, that there shall in no event be any abatement from said minimum royalty for either or both of the causes mentioned in this Article for a greater length of time than three (3) months altogether, in any one year during the continuance of this lease."

4. That effective on and after April 1, 1935, and for the period during which said Deed of Lease dated July 12, 1934, as herein supplemented, modified or amended, shall continue in force, Article Fourteenth of said Deed of Lease is hereby supplemented, modified, and amended so as to provide as follows:

"In the event said agreement dated July 10, 1934, between the Receivers and the Contractor, as supplemented, modified, and amended by agreement dated April 1, 1935, between the Receivers and the Contractor, providing for performance by the contractor of the said service and work of mining, producing, and loading said coal for the Receivers during the period co-extensive with the period for which said Deed of Lease dated July 12, 1934, is, in and by agreement dated April 1, 1935, between Lessor, and Lessees, extended, and renewed, shall be terminated by the Lessees

56 (i) by reason of the breach or default on the part of the Contractor under its said agreement dated July 10, 1934, as so supplemented, modified, or amended, or (ii) in the exercise by the Lessees of their rights under the provisions of paragraphs 7 (a), 7 (b), or 7 (c) of said agreement dated April 1, 1935, between the Receivers and the Contractor, the Lessees, pro-

vided they shall have paid to the Lessor all rents or royalties that shall then have accrued to the Lessor hereunder, may, in any of such events, if the Lessees so elect, terminate this lease, as so extended and renewed, upon the expiration of fifteen days' written notice to the Lessor of such election, and upon such termination of this lease the Lessees shall be absolved from any and all further obligations under this lease."

5. That all the applicable terms, provisions and conditions of said Deed of Lease dated July 12, 1934, as said Deed of Lease is in and by this agreement supplemented, modified, or amended, shall, on and after April 1, 1935, and during the remainder of the continuance of said Deed of Lease, continue in full force and effect unaltered and unimpaired, and as relating and applicable to the matters and things to which said terms, provisions and conditions under or by virtue of said Deed of Lease as so supplemented, modified, or amended, respectively, relate to and apply.

6. That the lease by Lessor to Lessees created and existing under and by virtue of said Deed of Lease dated July 12, 1934, as herein supplemented, modified, or amended, unless terminated prior to July 17, 1938, under or by virtue of any of the provisions therein or herein contained, shall, at the option of the Receivers, be renewed or extended for the further period of one (1) year from and after July 17, 1938, upon and subject to the same terms, conditions, covenants, stipulations, and agreements as in said Deed of Lease, as supplemented, modified, or amended by this agreement, and in this agreement, contained, provided sixty (60) days' previous written notice of the intention of the Receivers to so renew or extend same shall be given by the Lessees to the Lessor.

In testimony whereof, Witness the signatures and seals of the parties hereto as of the day and year above written.

GLAMORGAN COAL LAND CORPORATION,

By (S) O. M. VICARS, *Its President*,

(S) LEGH R. POWELL, Jr.,

[SEAL]

(S) HENRY W. ANDERSON,

[SEAL]

As Receivers of Seaboard Air Line Railway Company.

Attest:

(S) J. J. KELLY, Jr., *Secretary*.

58 I hereby certify that the foregoing is a true and correct copy of agreement No. 23781-Sup. dated April 1, 1935, as executed between Glamorgan Coal Land Corporation and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of

which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
*Custodian of Contracts for
 Receivers of Seaboard Air Line Railway.*

58-A *Comptroller's Contract No. 23781-C*

GS 81165 jeg 9-2-37

THIS AGREEMENT, Made this 1st day of September 1937 by and between Peerless Coal Corporation, a corporation of Virginia (hereinafter called "Company"), party of the first part; and Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, but not individually (hereinafter called "Seaboard Receivers"), parties of the second part; witnesseth that

Whereas, the Company, subject to the assent of the Seaboard Receivers, has purchased and acquired all of the right, title, and interest of Glamorgan Coals, Incorporated, and or its Receivers, in and to and under or by virtue of that certain agreement dated July 10, 1934, between the Seaboard Receivers and Glamorgan Coals, Incorporated (which agreement by its terms is not assignable without the consent of the Seaboard Receivers), as said agreement had been from time to time modified, amended, extended, and supplemented by the parties in interest since the appointment on January 16, 1937, of receivers of the properties and assets of Glamorgan Coals, Incorporated, and which agreement (as so modified, amended, extended, and supplemented), as of the time of said purchase and transfer thereof, contains the terms, provisions, and conditions set forth and contained in the statement thereof marked Exhibit "A," hereto attached and made a part of this agreement; and

Whereas, said right, title, and interest in and to and under or by virtue of said agreement was sold to the Company (subject to the assent of the Seaboard Receivers) on August 23, 1937, pursuant to decree of the Circuit Court of Wise County, Virginia, in the Glamorgan receivership cause therein pending entitled

"Glamorgan Coal Land Corporation, Complainant, versus Glamorgan Coals, Incorporated, Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, Paul J. Kent, Receiver of Chattanooga National Bank, and Shenandoah Life Insurance Company, Defendants," and the sale and transfer of said agreement to the Company (subject to assent thereto by the Seaboard Receivers) was confirmed by decree of said Court entered in said cause on August 31, 1937; and

Whereas, the Company has requested that the Seaboard Receivers consent and agree to said purchase by and transfer to the Company of said agreement, and the Seaboard Receivers, in consideration of the covenants of the Company, and upon and subject to the terms and conditions, hereinafter in this agreement contained are willing to consent and agree to such purchase and transfer;

Now, therefore, in consideration of the premises and of the mutual covenants of the Seaboard Receivers and of the Company hereinafter contained, the Company and the Seaboard Receivers hereby agree as follows:

1. The Seaboard Receivers, in consideration of and subject to the performance of the covenants of the Company hereinafter contained, and effective immediately on and after the time of entry on August 31, 1937, of decree of said Court confirming said purchase by and transfer to the Company of said agreement, hereby consent and agree to the purchase of and transfer to the Company of all the right, title, and interest of Glamorgan Coals, Incorporated, and, or its Receivers appointed in said receivership cause, in and to and under or by virtue of said agreement dated July 10, 1934 (as so modified, amended, extended, and supplemented), containing the terms, provisions, and conditions as set forth in said Exhibit "A" attached as a part of this agreement.

2. The Company, in consideration of said consent and agreement by the Seaboard Receivers, and effective immediately on and after the time of entry on August 31, 1937, of said decree of confirmation, covenants and agrees as follows:

(a) That it will duly and punctually comply with, carry out, and perform all of the terms, provisions, and conditions of said agreement dated July 10, 1934 (as so modified, amended, extended, and supplemented) and as set forth and contained in said Exhibit A attached as a part of this agreement and on the part of the Contractor thereunder to be complied with, carried out, and performed, according to the true intent and meaning of said terms, provisions, and conditions.

(b) That concurrently with the execution and delivery of this agreement, the Company will execute and deliver to the Sea-

board Receivers good and sufficient bond in the sum of Seventy Thousand Dollars (\$70,000), with surety thereon satisfactory to the Seaboard Receivers, conditioned upon the faithful performance by the Company of the obligations of the company to comply with, carry out, and perform all and singular the terms, provisions, and conditions of said agreement, as same are set forth and contained in said Exhibit A attached as a part of this agreement and on the part of the Contractor thereunder to be complied with, carried out, and performed.

The Company and the Seaboard Receivers mutually covenant and agree as follows:

(a) That wherever in said attached Exhibit A, and as the context thereof shall require, the word "Receivers" is used, it relates to and means the Seaboard Receivers, and the word "Contractor" is used, it relates to and means the Company.

(b) That effective immediately on and after the time of entry on August 31, 1937, of said decree of confirmation, all of the terms, provisions, and conditions of said agreement dated July 10, 1934 (as so modified, amended, extended, and supplemented), and as set forth and contained in said Exhibit A attached as a part of this agreement, shall be in full force and effect and binding, as between the Seaboard Receivers and the Company.

58 C In testimony whereof, witness the signatures and seals of the parties hereto as of the day and year first above written.

PEERLESS COAL CORPORATION,

By (S) W. C. SHUNK, *Its President*.

(S) LECH R. POWELL, JR., [SEAL]

(S) HENRY W. ANDERSON, [SEAL]

As Receivers of Seaboard Air Line Railway Company.

Attest:

[SEAL] (S) JOHN ROBERTS, *Secretary*.

Witnesses as to execution hereof by Peerless Coal Corporation:

(S) WM. T. BOWEN.

(S) ROSE ASHER.

Witnesses as to execution hereof by Lech R. Powell, Jr., as Receiver of Seaboard Air Line Railway Company:

(S) W. G. JONES.

(S) W. E. RACHELS.

Witnesses as to execution hereof by Henry W. Anderson, as Receiver of Seaboard Air Line Railway Company:

(S) W. G. JONES.

(S) W. E. RACHELS.

GS 81165 jeg 7-17-37

Statement of all the terms, provisions, and conditions, in force and effect as of April 22, 1937, of agreement dated July 10, 1934, referred to in and made a part of decree entered by the circuit court of Wise County, Virginia, in the cause of Glamorgan Coal Land Corporation vs. Glamorgan Coals, Incorporated, Legh R. Powell, Jr., and Henry W. Anderson, receivers of Seaboard Air Line Railway Company, Paul J. Kent, receiver of Chattanooga National Bank and Shenandoah Life Insurance Company, on the 2nd day of August 1937.

Whereas, the Receivers have leased from Glamorgan Coal Land Corporation, a corporation under the laws of Virginia (hereinafter called "Landowner") under Deed of Lease dated July 12, 1934, for a term or period which expires on July 17, 1938, with the right in the Receivers at their option of renewal thereof for one year after July 17, 1938, the exclusive right and privilege of extracting, mining, manufacturing, and transporting from the mine and loading on cars at the mine tipples for shipment to or for account of the Receivers, the coal in, upon or under all those certain tracts or boundaries of coal lands, coal rights, and surface rights situated near the Town of Wise, Wise County, Virginia, mentioned and described and leased to the Receivers in and by that certain Deed of Lease dated July 12, 1934 (as heretofore extended, modified, supplemented, and amended by agreements between the Landowner and the Receivers) made by and between the Landowner and the Receivers, which Deed of Lease has, prior to or contemporaneously with the execution and delivery of this agreement, been filed for record, or duly recorded, in the public records of said Wise County, and to which Deed of Lease reference is hereby made for a further and more detailed description of said tracts or boundaries of coal lands, coal rights, and surface rights in and by said Deed of Lease so leased to the Receivers.

That the Receivers and the Contractor, in consideration of the mutual benefits, each contracting also in consideration of the covenants of the other party hereto hereinafter contained, covenant, and agree as follows:

1. That the Contractor, in the performance of its service and work herein contracted for, will employ and use all of those certain buildings, tipples, and other structures, and all the equipment, machinery, appliances, and appurtenances (hereinafter collectively called "improvements") located on the boundaries or tracts of land mentioned and described in said above-mentioned Deed of Lease from Glamorgan Coal Land Corporation to the Receivers,

dated July 12, 1934. The Contractor will at all times during the continuance of this agreement, or of any extension or renewal thereof, maintain the improvements in good and serviceable working order and condition.

2. The Contractor will, at its sole expense, extract said coal from the mine or mines on said leased premises, mine, manufacture, and transport said coal from the mine to the tippie and load said coal at the tippie on railroad cars ready for shipment by or for the account of the Receivers; said coal to be so extracted, mined, manufactured, transported, and loaded by the Contractor to be Mine Run coal which will comply with the specifications of the Receivers for locomotive coal No. 65, revised February 14, 1933, a copy of which specifications is attached to this statement as a part hereof and marked "Exhibit B." Said coal is to be so extracted, mined, manufactured, transported, and loaded by

60 the Contractor as to insure to the Receivers a regular and constant supply of such coal on railroad cars at the mine tippie, ready for shipment, in the following quantities: 13,500 tons per month during the months of May, June, July, and August of each year of the continuance of said agreement, and 15,000 tons per month during each of the months from September to April, both inclusive, of each year, and that the aggregate maximum tonnage shall be 25,000 tons during each month of the continuance of this agreement, as may be currently required by the Seaboard Receivers. The Seaboard Receivers will direct the Contractor to mine, produce, and load not less than the above specified minimum tonnage for each of the months, respectively.

Should the Contractor at any time, for any cause not made excusable by the provisions of this agreement, fail to mine and so load the monthly quantity of coal above specified, then the Receivers shall have the right, at their option, to purchase coal to make up such shortage at the ruling market price, and the Contractor will, in such case, reimburse the Receivers for any excess cost in procuring such coal.

All coal mined and loaded by the Contractor under this agreement will be reasonably free from slate, soapstone, shale, fire clay, sulphur, "bony coal," and other noncombustible or nearly noncombustible impurities.

The Contractor will load the coal in the Receivers' hopper bottom and drop-bottom gondola cars, so far as the same are made available by the Receivers, and/or on other cars as and when previously authorized by the Receivers. The cars will be loaded to full visible capacity, but not exceeding the stencilled load limit, and so loaded that coal will not fall off in transit. The coal so mined and loaded by the Contractor under this agreement is to be shipped by the Receivers, or by the Contractor for their account.

to points and via routes as prescribed by the Receivers. When cars of the Receivers are not available in sufficient quantities for loading all shipments hereunder the Contractor will keep the Receivers fully advised by telegram of such condition.

General strikes in the same field, accidents to machinery, railroad embargoes, or other contingencies or casualties beyond the control of the Contractor shall be a sufficient excuse for the complete or partial failure caused thereby of the Contractor to comply with the terms of this agreement until a reasonable time has elapsed for remedying such condition. If the Contractor fails, for any of the aforesaid causes, to mine and/or load the amount of coal herein provided to be mined and loaded, for a continuous period of more than sixty (60) days, then the Receivers shall have the right to cancel this agreement by written notice to that effect given the Contractor.

If the coal mined and loaded by the Contractor hereunder is not of a clean and good steaming character or not mined and/or loaded in accordance with the terms hereof, then the Receivers may in any such case, at their option, cancel this agreement.

All coal mined, produced and/or loaded by the Contractor under this agreement may be inspected at the mines by an authorized representative of the Receivers, and the Receivers will be required to pay the Contractor hereunder for only such coal as is accepted by their authorized representative as being in compliance with this agreement and the attached specifications, such inspection
61 and refusal by the Receivers to pay for coal to be final.

When the coal loaded by the Contractor which is not inspected at the mine by the Receivers is believed to be of a grade inferior to that provided for in said specifications, the Receivers will give the Contractor written notice and the Contractor will immediately have its representative inspect the coal jointly with the Receivers' representative, and such representatives will endeavor to agree as to the grade and quality of the coal. In the event of disagreement between such representatives as to ash content, or as to screenings, such questions shall be determined in the manner hereinafter provided, and the result of such determination will be final and conclusive. All coal found to be of inferior grade shall be promptly removed by the Contractor free of all cost or expense to the Receivers. The percentage of ash content and of screenings shall be ascertained as to each car in question, unless by mutual consent of the representatives of the parties a single car be selected to represent a number of cars and the results of the test made of said car applied to the entire number.

To ascertain the ash content, a representative sample shall be taken and reduced to a laboratory sample by crushing all of the coal to a small size and by quartering and successively rejecting

alternate quarters. To obtain a representative sample where it is impracticable to dump the entire contents of the car and sample every portion thereof, the coal shall be collected evenly from throughout three trenches dug at regular intervals across the car, about one foot in width and averaging not less than three feet in depth below the surface of the coal.

The laboratory sample shall be divided between the Receivers and the Contractor and these samples sealed and forwarded immediately for ash determination to two chemists, one to be designated by the Receivers and the other by the Contractor. Should the chemists' results vary two per cent, or less, the average of the two analyses shall govern; should they vary more than two per cent a joint sample will be submitted to a third chemist for final analysis; the expenses and fees of such submission to be paid by the party whose own chemists' analysis shows the greater variation from the final analysis.

Should the representatives of the parties disagree respecting the percentage of screenings, a representative sample of approximately one ton shall be passed over a screen (as set out in the attached specifications) set at an angle of forty-five degrees with the horizontal, and the portions thus separated shall be weighed.

The Seaboard Receivers shall not be required to pay the Contractor for extracting, mining, manufacturing, transporting, and/or loading mine run coal containing over eight per cent (8%) ash or over thirty-five per cent (35%) of screenings or not otherwise conforming to the aforesaid specifications.

The Contractor is, at its sole expense, to perform all service and work of every sort, character, and description, and is to furnish or provide all the labor, materials, supplies, machinery, equipment, appliances, and facilities, necessary or convenient for, or in and about, the performance of all of the service or work of so extracting, mining, manufacturing, transporting, and loading said coal. The Contractor will, at its sole expense, provide and at all times during the continuance of this agreement maintain, manage, and conduct such organization as is necessary to the efficient and punctual performance by the Contractor of the service and work herein contracted for by it. The Contractor is to conduct said service and work, and its mining operations and the works, on said premises in a safe, skillful, and workmanlike manner and in accordance with the rules and methods of good modern coal mining operations and in compliance with all laws of the State of Virginia relating thereto, and all other laws, regulations, and code, or other requirements or practices applicable thereto, and shall employ any and all such means and methods as will properly so extract, mine, manufacture, transport, and load said coal.

3. The Contractor will assume and perform all obligations, liabilities, and duties of the Receivers to the Landowner which shall at any time accrue, exist, or arise under or by virtue of the Deed of Lease between the Landowner and the Receivers whereunder the Receivers have leased the rights above mentioned (except the obligation of the Receivers under such Deed of Lease to pay to the Landowner the rental or royalty per ton currently payable by the Receivers thereunder to or upon the order of the Landowner, and/or except the minimum royalty, if any, provided for in said Deed of Lease) and the Contractor will at all times, and he does hereby (except as to said rental or royalty payments), protect, indemnify, and save harmless the Receivers from and against, and/or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise.

4. The Contractor hereby assumes and will duly and punctually pay and discharge all taxes, assessments, and levies assessed on, against or in respect of the improvements on said land, and/or on, against or in respect of all the property or rights, if any (other than on said land) granted the Receivers under said Deed of Lease between the Landowner and the Receivers, including privilege, license, and other taxes, if any, imposed or assessed against the Receivers.

5. The Contractor will, at its sole expense, take out and maintain in full force and effect at all times during the continuance of this agreement, employer's liability, casualty, and such other insurance as is customarily and under prudent and modern mining company practice carried by mining companies, which is not carried for the benefit of the Landowner, in each case, in the aggregate amount, with such insurance company or companies and under such forms of policies, as shall be approved by the Receivers, to the end that such insurance will adequately and fully protect the respective interests of the Receivers and the Contractor. The loss, if any, under such insurance policies shall be made payable to the Contractor and/or the Receivers, as their respective interests may appear, and the Contractor will, upon request of the Receivers, promptly furnish the Receivers with appropriate certificate or certificates by the insurers that such insurance has been so taken out by the Contractor and is maintained in force as in this section hereof provided.

6. The Contractor will duly and punctually pay all costs and expense of every sort, character, or description necessary to, in and about or incident or related to the service and work herein agreed to be performed by the Contractor, and the Contractor expressly assumes all risk of, agrees to at all times, and does hereby protect, indemnify, and save harmless the Receivers from and against, and in respect of, accidents, casual-

ties, and all other risks incident to or in respect of the service and work herein contracted for.

The Contractor further assumes all responsibility for and will at all times, and it does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of:

(a) All loss and expense incident to injury, fatal or otherwise, to persons, and or damage to property, arising, or growing in any manner, directly or indirectly, out of or in connection with (i) the service, work, or any other matter or thing contemplated under this agreement to be carried out, done, or performed by the Contractor; and or (ii) entry by the Contractor, its agents, servants, employees, or representatives, or other persons, in said mine and or its or their presence in, on or in the vicinity of, and or the use, working, or occupancy of, said mine or premises, and or the buildings, tipples, structures, equipment, machinery, appliances, and appurtenances, now or hereafter located in or on or near said mine or premises.

(b) All taxes, assessments, and levies (except taxes on the land or other taxes, if any, paid by the Landowner) imposed by any Governmental authority or body on or in respect of said mine or premises, buildings, structures, equipment, machinery, appliances, and appurtenances, and or on or in respect of the rights or privileges of either the Contractor or of the Receivers therein or with respect thereto, and or the revenues, issues, or profits thereof.

(c) All fines, penalties, and other loss which may result from the actual or alleged violation by the Contractor, its agents, servants, or employees, of any law, ordinance, or regulation of any public authority or body, and all liens, claims, or other liability for or on account of work, labor, materials, or supplies for the service and work contemplated under this agreement.

(d) The terms "expense" and "loss" as used in this section are intended and shall be construed to include attorneys' fees and costs, as well as all other expenses.

7. (a) The Receivers will pay the Contractor for the service and work performed by the Contractor during the period from April 1, 1937, to July 1, 1937, of extracting, mining, manufacturing, transporting, and loading of coal, and in payment and reimbursement for all the other obligations, matters, and things which the Contractor under the foregoing provisions agrees to do and perform during said period, a flat sum of \$1.81 per ton of 2,000 pounds of coal which is so mined, produced, and loaded on railroad cars by the Contractor, conforms to said specifications and passes the inspection of the Receivers. The Receivers will pay the Contractor for such service and work performed by the

Contractor on and after July 1, 1937, and during the period of continuance after July 1, 1937, of this agreement, and in payment and reimbursement for all such other obligations, matters, and things, a flat sum of \$1.82 per ton of 2,000 pounds of such coal which is on and after July 1, 1937, mined, produced, and loaded on railroad cars by the Contractor, conforming to said specifications and passes the inspection of the Receivers.

64 It is agreed that included in said flat sum of \$1.81 per ton are the following sums per ton: sixteen cents (16c) representing the estimated cost to the Contractor of the general wage increases in the same field effective April 1, 1937, four cents (4c) per ton to cover Social Security taxes payable by the Contractor, and one cent (1c) per ton to cover excise tax which it is anticipated the Contractor may be required to pay under the Bituminous Coal Act of 1937, if and when such Act becomes law. In the event the actual cost per ton to the Contractor of such wage increase shall be less than sixteen cents per ton, the Contractor will refund to the Receivers the amount paid the Contractor for the period from April 1st to July 1, 1937, by the Receivers in excess of such actual cost per ton. In the event said excise tax of one cent per ton shall be judicially and finally determined to be not a validity imposed tax, then in such event, the Contractor will, to the extent such tax shall be so determined not to be a validly imposed tax, refund to the Receivers the amount of such tax for which the Contractor shall at the time of such determination have received payment or reimbursement from the Receivers through the payment by the Receivers of said flat sum of \$1.81 per ton. Except as and to the extent above provided, said flat sum of \$1.81 per ton payable by the Receivers to the Contractor shall not be subject to adjustment.

It is also agreed that said flat sum of \$1.82 per ton payable by the Receivers to the Contractor hereunder, on and after July 1, 1937 includes like amounts per ton to cover said excise tax and that the above stated provisions in respect of refund by the Contractor to the Receivers of such excise tax, in the event such tax shall be so determined not to be a validly imposed tax, shall apply with like force and effect to said amount of one cent per ton included in said flat sum of \$1.82 per ton. It is further agreed that said last mentioned flat payment applicable hereunder on and after July 1, 1937 shall be subject to adjustment upward or downward depending upon the fluctuation of wages and unit prices over which the Contractor has no control, as hereinafter in this section set forth.

To the extent that the Contractor's costs per ton on and after July 1, 1937 are increased by increase in the elements of cost as set forth in Exhibit C attached as a part hereof, over which the

Contractor has no control, then to that extent the flat base sum of \$1.82 per net ton applicable hereunder on and after July 1, 1937 shall be adjusted upward. Such increased cost per ton shall be computed on tonnage so produced and loaded on railroad cars during the contract year or for such shorter period as this contract shall continue in effect. If the elements of cost per ton shown on Exhibit C are reduced, said flat rate of \$1.82 per ton shall be reduced to the extent of such reduction per ton.

(b) That if at any time after April 22, 1937, and during the remainder of the continuance of this agreement, the Receivers shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to the Receivers at a total cost per ton to the Receivers of less than the amount per ton (i. e., the compensation per ton currently payable to the Contractor under this agreement for its work and service, plus the royalty charge of eight cents per ton or of ten cents per ton, as the case may be) at the time being paid by the Receivers for coal mined and shipped for them by the Contractor, the Receivers shall have the right at their option, in such event and from time to time as often as such event shall happen, upon ten (10) days' previous written notice given by them to the Contractor of such intention,

to terminate this agreement, and same shall, upon such
65 notice being given, thereupon stand terminated, unless the Contractor shall, before the expiration of said ten (10) days' notice, agree in writing with the Receivers to reduce the cost to the Receivers of such work and service by the Contractor to an amount equal to or less than such total cost to the Receivers to purchase such other coal.

(c) That if at any time after April 22, 1937, and during the remainder of the continuance of this agreement, the Receivers shall, on account of freight rate changes or changes in divisions of freight rates effective at any time after April 22, 1937 (which increase the cost to or charges against the Receivers for the transportation from the mine to the point of destination designated by the Receivers of the coal shipped to the Receivers under this agreement), discontinue the purchase of coal in this same coal field, the Receivers shall have the right at their option, in such event and from time to time, as often as such event shall happen, upon ten (10) days' previous written notice by them to the Contractor of such intention, to terminate this agreement, and same shall, upon such notice being given, thereupon stand terminated, unless the Contractor shall, before the expiration of said ten (10) days' notice, agree in writing with the Receivers to reduce the cost per ton to the Receivers for the work and service which the Contractor is obligated under this agreement to perform, to an amount which will make the total cost per ton to the Receivers,

(i. e., the compensation per ton currently payable to the Contractor under this agreement for such work and service plus the royalty charge of eight cents per ton or of ten cents per ton, as the case may be, at the time being paid by the Receivers for coal mined and shipped for them by the Contractor, plus such freight or transportation charges), of coal so mined and shipped under said agreement, an amount equal to or less than the total cost per ton to the Receivers of coal delivered at the point of destination, of a grade satisfactory to the Receivers, which they shall be able to purchase in some other coal field.

(d) The Contractor shall have the right to sell for account of the Receivers such of the coal produced by it hereunder as may be necessary to supply the domestic requirements of its employees engaged in the service and work contracted for by it under this agreement. Such coal shall be so sold at the applicable Code price, or, if no Code price be applicable, at the prevailing price for coal so sold in the same field. Payments due for coal so sold shall be collected by the Contractor and the difference between the selling price and the cost to the Contractor of producing and so selling such coal shall be applied or credited against the Contractor's cost of coal produced and loaded under this agreement. A complete record of all such sales shall be kept by the Contractor.

(e) In making payments to the Contractor in respect of coal extracted, mined, manufactured, transported and loaded under this agreement, the actual weights ascertained by the initial carrier will govern and will be accepted by the parties hereto, except, however, that the Contractor agrees to refund to the Receivers any excess freight charges due to the Contractor's failure to load cars for shipment to the Receivers with the quantity of coal specified by the governing freight tariffs as carload minimum.

66 (f) The Contractor will issue on the last day of each month invoice covering all coal loaded by the Contractor under this agreement during that month, showing thereon the number and initials and the total weight of each car, and the net weight of the coal loaded therein. The Receivers will pay the Contractor in respect of all coal extracted, mined, transported, and loaded during each month, not later than the twenty-fifth day of the succeeding month, provided the invoices of the Contractor are received not later than the fifth day of the succeeding month.

(g) The payment by the Receivers to the Contractor of the flat sum per ton provided for in Section 7 (a) of this agreement (as and to the extent such sum may be adjusted pursuant to the provisions of this agreement), shall be in full settlement, satisfaction, and discharge of and for all the service and work and all the other obligations, matters, and things, which the Contractor in and by

this agreement agrees or undertakes to do and perform, or cause to be done and performed, and in full payment, satisfaction and discharge of all claims, demands, or causes of action of every sort, character, or description of the Contractor under or by virtue of this agreement.

(b) If at any time before the completion of and final settlement with the Contractor for the service, work, matters, or things herein agreed by it to be done or performed, the Receivers shall become subject to or receive notice of any claims or liens for work done or materials or supplies furnished for or on account of said service, work, matters, or things and or any loss, liability, cost, and expense which the Contractor assumes hereunder and/or indemnifies the Receivers against, or if the Contractor is at any time in default in making payments to any subcontractor, laborers, materialmen, or others in connection with said service, work, matters, or things, then the Receivers may, at any time, withhold from all payments due or to become due the Contractors from the Receivers, whether growing out of said service, work, matters or things, or otherwise, such amount as may, in the opinion of the Receivers, be necessary to reimburse or indemnify the Receivers against all such claims, liens, loss, liability, cost, and expense, whether the same shall or shall not have been definitely liquidated or ascertained, or be in dispute or litigation, and may apply the amount so withheld, or so much thereof as may be necessary, in reimbursing and indemnifying the Receivers.

8. Anything in this agreement to the contrary notwithstanding, in making payments in respect of coal extracted, mined, manufactured, transported, and loaded by the Contractor under this agreement, the Receivers shall have the right, at any and all times, to offset or deduct the amount of any and all claims and, or indebtedness of the Receivers against the Contractor accrued subsequent to January 15, 1937, whether arising under this or any other contract or transaction.

9. Whenever it shall be contended by the Contractor that the Contractor, under any of the provisions of this agreement, is entitled to any increase, or by the Receivers that the Receivers are entitled to any decrease, in the amount of the flat sum per ton currently payable by the Receivers to the Contractor for the work and service performed or to be performed by the Contractor under this agreement, the Receivers, or their authorized representatives, shall be given access to the property, records, and
67 accounts of the Contractor at all times for the purpose of ascertaining and verifying the facts bearing upon such contentions, respectively, and the Contractor agrees that it will cause all records and accounts to be kept up to date and in conformity with approved accounting regulations and requirements.

10. The Receivers shall have the right to keep an inspector at the mine at their expense. The Contractor will provide suitable working quarters for the accounting representative of the Receivers while engaged in the work of examining the records and accounts of the Contractor for any of the purposes referred to in paragraph numbered 9 of this agreement.

11. This agreement shall continue in force and effect until July 17, 1938, unless terminated prior to that date under or by virtue of any of the provisions of this agreement, and shall, at the option of the Receivers, be renewed or extended for the further period of one (1) year from and after July 17, 1938, upon the same terms and conditions, provided sixty days' previous written notice of the intention of the Receivers to so renew or extend same shall be given by the Receivers to the Contractor.

12. The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence, or omissions of the Contractor, its agents, servants, employees, or representatives.

13. The Contractor shall not assign, sublet, or transfer its rights or obligations under this contract, without the previous written consent of the Receivers.

14. In case of a difference of opinion, or dispute, between the Receivers and the Contractor as to the interpretation of this agreement, or in any manner arising out of the operations conducted under it or because of it, no action at law or suit in Court shall be instituted until the award is had of a Board of Arbitration herein provided for, except to enforce said award which shall be final and conclusive between the parties to the same. Said Board shall be constituted as follows:

Within thirty days after the written notice given by either party to the other, each party shall appoint an arbitrator and the said two arbitrators shall, if necessary to a conclusion, have the power, and it shall be their duty within sixty days from their appointment, to appoint a third; and a decision of the majority of a Board so constituted shall be regarded as the decision of the Board; and, if within the said thirty days, either of the parties shall neglect, fail or refuse to appoint an arbitrator as required, then the other may appoint an arbitrator to represent the delinquent party whose opinion shall be equally binding as if appointed by the delinquent party aforesaid; and in case of failure on the part of said Board of Arbitration or any of them to act within ninety days after the date of notice given as aforesaid, a new Board may, at the option of either party, be demanded and within thirty days after such demand in writ-

ing shall be constituted after the same manner and governed as provided for the first Board, and with the same power to decide; but no person so previously appointed as an arbitrator shall be reappointed to act on the same question.

68 15. Subject to any right to cancel or terminate this agreement as provided herein or given by law, the provisions of this agreement, so far as they are applicable to the Receivers, shall be binding upon, and shall inure to the benefit of, the Receivers (as Receivers of Seaboard Air Line Railway Company, but not individually) and their successors, the Seaboard Air Line Railway Company and its successors, the railroad corporation which may, after the termination of the receivership of Seaboard Air Line Railway Company, control and operate the line of railroad and appurtenant physical properties, to the business of which the subject matter of this agreement relates, and the successors of such railroad corporation.

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Exhibit B

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell, Jr., and Henry W. Anderson, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

Mine Run Coal:

Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than eight percent ash and not more than 35 percent of screenings which will pass through a screen having one inch opening between the bars.

Screened Coal:

----- Inch Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than ----- inches in the clear between the bars, or a round hole shaker screen with openings not less than ----- inches in diameter. It must be of a clean and good steaming character containing not more than ----- percent ash and not more than ----- percent of screenings which will pass through a screen having one inch opening between the bars.

Washed ----- Inch Steam Coal:

Washed ----- Inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a ----- inch round hole shaker screen with openings not less than -----

inches in diameter, then over a round hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____ inch bar or _____ inch round hole shaker screen and over the _____ inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____ inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately _____ percent washed coal to _____ percent hand picked lump coal and shall contain not more than _____ percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____ percent ash.

Washed Run of Mine Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a _____ inch round hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____ inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately _____ percent washed coal to _____ percent hand picked lump and shall contain not more than _____ percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____ percent ash.

Washed Steam Coal Screened and Rescreened:

Washed _____ inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than _____ inches in the clear, or through a round hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____ inch bar or _____ inch round hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed and shall contain not more than _____ percent of screenings which

will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

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Exhibit C

(1) Where increases only are referred to herein it is understood that the same relative effect will be given to decreases; provided, however, that no adjustment shall be made for increases unless the increase amounts to at least two cents per ton, for the aggregate of all items enumerated on this Exhibit "C", for each contract year or portion thereof that the contract is in effect. No increases are to be allowed in respect of additions, betterments, improvements, or development costs properly chargeable to capital account.

(2) Increases in wages will be allowed over those in effect, pending, or proposed at the effective date of the agreement of which this Exhibit is a part insofar as wages over which the Contractor has no control are concerned; also all increases in compensation insurance due to increases in rates over the rate effective July 1, 1934.

(3) Other elements of costs enumerated below will be based on increases over the average prices of each element paid by the Contractor during the three months period following the effective date of said agreement, provided, however, if in the opinion of the Receivers or the Contractor such prices are not representative, or no purchases have been made during such period, then the prices obtaining as of the date of said agreement will be ascertained by the Receivers' Purchasing Agent from authoritative sources and such prices so ascertained will be used as a basis for determining increased or decreased costs of such elements of cost, viz:

Ties and props.
 Rails and track fastenings.
 Explosives.
 Motor and parts.
 Mine cars and parts.
 Fans and parts.
 Pumps and parts.

Mining machines and parts.
 Electrical trolley wire and bindings.
 Tipple parts.
 Mules and feed.
 Shovels, picks, drills, jacks, and lubricants.

NOTE.—Items costing less than \$10 each shall be disregarded unless purchased in volume at one time the aggregate cost of which is in excess of \$10, that is to say, that invoices of \$10 or less will be disregarded in order to save refinement in accounting.

(4) Increases in taxes due to increases in rates of levy or to new taxes lawfully imposed, payable by the Contractor under the agreement of which this Exhibit is a part, on, or in respect of, property

or rights (other than on the land) acquired, or to be acquired, by the Receivers or Seaboard Air Line Railway Company, under agreement referred to in said first mentioned agreement) with Glamorgan Coal Land Corporation, and on, or in respect of, property owned or used by, or rights or privileges of, the Contractor in mining, producing and loading coal under this agreement, will be allowed in computing increased costs to the extent such rates of levy exceed those in effect in 1934.

(5) Increases in the basic scale of power rates will be allowed, but changes in power costs due to the volume of power used shall not be allowed.

71 I hereby certify that the foregoing is a true and correct copy of agreement No. 23781-Sup. dated September 1, 1937, as executed between Peerless Coal Corporation and Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,
*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

72 *Comptroller's Contract No. 23782-1*

HUNTINGTON, W. VA., June 30, 1936.

TO MESSRS. LEGH R. POWELL, JR., and HENRY W. ANDERSON,
*As Receivers of Seaboard Air Line Railway Company,
Norfolk, Virginia.*

GENTLEMEN: This letter will confirm verbal understanding of the undersigned with you that effective on and after June 30, 1936, that certain letter-agreement dated June 19, 1936, between you and the undersigned in respect of the extension and renewal as, and upon and subject to the terms and conditions in said agreement dated June 19, 1936, set forth, of the existing Indenture of Lease dated May 1, 1934, therein mentioned between you and the undersigned, is by mutual consent of you and the undersigned amended and modified as follows:

(a) By inserting after the word "undersigned," in the 6th line of paragraph numbered 1 of said agreement dated June 19, 1936, the words "on and after July 1, 1936."

(b) By eliminating from the last line of para. 1, graph numbered 2 of said agreement dated June 19, 1936, the words "for the period ending on August 31, 1937, only" and substituting in lieu thereof the words "for the period beginning on September 5, 1936, and ending on August 31, 1937, only."

It is further understood that said agreement dated June 19, 1936, with the aforesaid amendments and modifications thereof, shall continue in full force and effect.

Yours very truly,

By (s) UNITED THACKER COAL COMPANY,
BUFORD C. TYNES.

Its Vice President.

H. LANGDON LAWS,

ALBERT H. COLE, and

CHAS. H. STEPHENS, JR., as Trustees in
*joint tenancy under Declaration of
Trust dated December 6, 1916.*

By (s) ROLLA D. CAMPBELL,

Their Attorney.

The above-stated understandings are hereby confirmed and agreed to by the undersigned this, the 30th day of June 1936.

(s) LEGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

73 I hereby certify that the foregoing is a true and correct copy of agreement No. 23762-Sup. dated June 30, 1936, as executed between United Thacker Coal Company by Buford C. Tynes, H. Langdon Laws, Albert H. Cole, and Chas. H. Stephens, Jr. as Trustees and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C. before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

At New York, June 19, 1936.

To: UNITED THACKER COAL COMPANY, and Messrs. H. LANGDON LAWS, ALBERT H. COLE, and CHARLES H. STEVENS, JR.,

Trustees in Joint Tenancy under and by virtue of a certain Declaration of Trust made and entered into on the 6th day of December, 1916, by United Thacker Coal Company.

Post Office Box No. 301, Huntington, West Virginia.

GENTLEMEN: Referring to the Indenture of Lease sated May 1, 1934 (as heretofore extended) whereunder you have let and leased to the undersigned, as Receivers of Seaboard Air Line Railway Company, the right and privilege of extracting, mining, and removing coal in, upon or under those boundaries or tracts of land, and certain other rights and privileges, in said Indenture of Lease mentioned and described.

The undersigned hereby offer to extend and renew said lease for the period beginning on September 5, 1936, and ending on August 31, 1937, with the right in the undersigned, at their option, to renew and extend said lease from year to year from and after August 31, 1937, not exceeding an aggregate period of two years thereafter, upon seventy-five (75) days' previous written notice to you by the undersigned of their intention to renew and extend said lease beyond August 31, 1937; such extension and renewal to and inclusive of August 31, 1937, and any such extensions or renewals thereafter, herein provided for, to be upon the same terms and conditions as are contained in said lease, with the following modifications thereof:

1. The undersigned to have the right, and to be obligated, during said extended period, or any extension or renewal thereof herein provided for, to extract, mine, and remove, or cause to be extracted, mined, and removed, from said leased properties and premises, for use by the undersigned, not less than an aggregate of 180,000 tons of coal in aggregate monthly quantities of not less than 15,000 tons per month; and the further right at the election of the undersigned to extract, mine, and remove, or cause or permit to be extracted, mined, and removed, therefrom, for their own use, or for such other use or disposition as the undersigned shall determine, such additional tonnage of coal as the undersigned shall elect to extract, mine, and remove, or cause or permit to be extracted, mined and removed, from said properties and premises.

2. In the event the agreement of the undersigned dated May 1, 1934, with Daniel N. Pritchard, Contractor, as said agreement will

(by supplemental agreement bearing even date herewith, to be executed and delivered simultaneously with your acceptance of the offer herein contained) be extended for the period beginning on September 5, 1936, and ending on August 31, 1937 (and with like right of renewal at the option of the undersigned), be terminated by the undersigned pursuant to the terms of the fourth literary paragraph of Section 7 (a) of said agreement (as said Section is set forth in said Supplemental Agreement) and the minimum annual rental still due to accrue to you under the terms of Section 7 of said Lease amounts to more than \$10,000, when pro rated over the remaining period of the Lease (as hereby offered to be extended,) you will accept the sum of \$10,000 in full satisfaction of such minimum annual rental, for the period ending on August 31, 1937, only.

If, as we understand, the foregoing offer of the undersigned is acceptable to you, will you please endorse your acceptance of such offer on the enclosed counterpart hereof, and return such counterpart so endorsed to the undersigned; such acceptance by you, or by your authorized representative in your behalf, to constitute the agreement of the undersigned with you in respect of the subject matters hereof.

Yours very truly,

(s) LEIGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

Receivers of Seaboard Air Line Railway Company.

76 The foregoing offer of the Receivers of Seaboard Air Line Railway Company is hereby accepted by the undersigned, this 19th day of June 1936.

UNITED THACKER COAL COMPANY,

By (s) BUFORD C. TYNES,

Its Vice President.

H. LANGDON LAWS,

ALBERT H. COLE and

CHARLES H. STEVENS, JR.,

Trustees in Joint Tenancy under Declaration of Trust dated December 6, 1916.

By (s) ROLLO D. CAMPBELL, *Their Attorney.*

77 I hereby certify that the foregoing is a true and correct copy of agreement No. 2378-Sup. dated June 19, 1936, as executed between United Thacker Coal Company, H. Langdon Laws, Albert H. Cole, and Charles H. Stephens, Jr., Trustees and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me

as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

*Custodian of Contracts for Receivers of Seaboard Airline
Railway Co.*

78

Comptroller's Contract No. 25782-A

This Supplemental Indenture, made this 14th day of May 1936, between United Thacker Coal Company, a corporation of the State of Maine, and authorized according to the laws of West Virginia to hold property and to do business in that State, on the one hand, and H. Langdon Laws, Albert H. Cole, and Charles H. Stephens, Jr., Trustees in joint tenancy under and by virtue of a certain Declaration of Trust made and entered into on the 6th day of December 1916, and of record in the office of the Clerk of the Mingo County Court, State of West Virginia, in Deed Book No. 34, page 290, on the other hand (who, as required by said Declaration of Trust, contract as such Trustees and not as individuals), hereinafter called "Lessors," parties of the first part; and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter called "Lessees," parties of the second part; Witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of the existing Indenture of Lease dated May 1, 1934 (as heretofore extended), whereunder the Lessors have let and leased to the Lessees the right and privilege of extracting, mining, and removing coal in, upon, or under those certain boundaries or tracts of land, located in Mingo County, West Virginia, and now or heretofore known as the William-Ann Mine properties, and certain other rights and privileges, is hereby further extended from and after July 31, 1936 to and inclusive of August 20, 1936.

2. That the Lessees shall have the right, at their option, to renew and extend said Lease, upon the same terms and conditions as are therein contained, (c) beyond August 20, 1936 and, from and after that date, to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said Lease to July 1, 1937, shall be given by the Receivers to the Lessors on or

before June 5, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Lessees to so renew or extend said Lease beyond June 30, 1937, shall be given by the Lessees to the Lessors.

3. That, except as herein modified, the terms and provisions of said existing Lease dated May 1, 1934 (as heretofore extended), shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, witness the signatures of the parties hereto, as of the day and date first above written.

UNITED THACKER COAL COMPANY,

By BUFORD C. TYNES, *Its Vice President.*

H. LANGDON LAWS, *Trustee.*

ALBERT H. COLE, *Trustee.*

CHARLES H. STEPHENS, JR., *Trustee.*

L. R. POWELL, JR., and

HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By -----, *Receiver.*

80 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup. dated May 14, 1936, as executed between United Thacker Coal Company, H. Langdon Laws, Albert H. Cole and Charles H. Stephens, Jr., Trustees and L. R. Powell, Jr. and Henry W. Anderson as Receivers of Seaboard Air Line Ry. Co., an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C. before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

81 *Comptroller's Contract No. 23782-A*

This Supplemental Indenture, Made this 14th day of April 1936, between United Thacker Coal Company, a corporation of the State of Maine, and authorized according to the laws State, on the one hand, and H. Langdon Laws, Albert H. Cole, of West Virginia to hold property and to do business in that

and Charles H. Stephens, Jr., Trustees in joint tenancy under and by virtue of a certain Declaration of Trust made and entered into on the 6th day of December 1916, and of record in the office of the Clerk of the Mingo County Court, State of West Virginia, in Deed Book No. 34, page 290, on the other hand (who, as required by said Declaration of Trust, contract as such Trustees and not as individuals), hereinafter called "Lessors," parties of the first part; and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter called "Lessees," parties of the second part: Witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of the existing indenture of Lease dated May 1, 1934, whereunder the Lessors have let and leased to the Lessees the right and privilege of extracting, mining, and removing coal in, upon or under those certain boundaries or tracts of land, located in Mingo County, West Virginia, and now or heretofore known as the "William-Ann" Mine properties, and certain other rights and privileges, is hereby extended from and after June 30, 1936, to and until July 16, 1936.

2. That the Lessees shall have the right, at their option, to renew and extend said Lease, upon the same terms and conditions as are therein contained, (a) beyond July 15, 1936, and from and after that date, to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said Lease to July 1, 1937 shall be given by the Receivers to the Lessors on or before May 1, 1936, and (b) from year 82 to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Lessees to so renew or extend said Lease beyond June 30, 1937, shall be given by the Lessees to the Lessors.

3. That if the United States Supreme Court shall not, before May 1, 1936, render its decision upon the question of the constitutionality of the Act of Congress, approved August 30, 1935, known as the Bituminous Coal Conservation Act, in the case of Carter V. Carter Coal Company, Docket No. 636, now before that Court for decision, then, in such event, the term or period of said existing Lease dated May 1, 1934, is hereby extended from and after July 15, 1936, to and until August 1, 1936; and in the event such further extension to August 1, 1936, shall become effective, the Receivers shall have the right at their option to renew and extend said Lease, upon the same terms and conditions as are therein contained, (a) beyond July 31, 1936, and for the period from and after that date to July 1, 1937, provided previous

written notice of the intention of the Lessees to so renew and extend said Lease to July 1, 1937, shall be given by the Lessees to the Lessors on or before May 15, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend said Lease beyond June 30, 1937, shall be given by the Receivers to the Lessors.

4. That, except as herein modified, the terms and provisions of said existing Lease dated May 1, 1934, shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, witness the signatures and seals of the parties hereto, as of the day and date first above written.

UNITED THACKER COAL COMPANY,
By T. IRVING HADDEN,

Its President.

H. LANGDON LAWS. [SEAL]

ALBERT H. COLE. [SEAL]

Attest:

CHARLES A. PALMER,

Its Treasurer.

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CHARLES H. STEPHENS, JR. [SEAL]

L. R. POWELL, JR., and

HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By L. R. POWELL, JR., [SEAL]

Receiver.

84 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup. dated April 14, 1936, as executed between United Thacker Coal Company, H. Langdon Laws, Albert H. Cole and Charles H. Stephens, Jr., Trustees, and L. R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

NORFOLK, VA., April 6, 1935.

U. S. Registered mail.

TO UNITED THACKER COAL COMPANY, *a corporation of the State of Maine and Messrs. H. LANGDON LAWS, ALBERT H. COLE, and CHARLES H. STEPHENS, JR., Trustees in Joint Tenancy under and by virtue of a certain Declaration of Trust made and entered into on the 6th day of December, 1916. Care United Thacker Coal Company, Post Office Box No. 301, Huntington, W. Va.*

GENTLEMEN: Referring to the Indenture of Lease dated May 1, 1934, whereunder you have let and leased to the undersigned, as Receivers of Seaboard Air Line Railway Company, the right and privilege of extracting, mining, and removing coal in, upon and under these boundaries or tracts of land, and certain other rights and privileges, in said Indenture of Lease mentioned and described.

You are hereby notified that pursuant to the provisions of Section 17 of said Indenture of Lease, the undersigned elect to renew and extend said lease for the period of one year, beginning on July 1, 1935, and ending on June 30, 1936, upon and subject to the same terms, conditions, covenants, stipulations, and agreements as in said Indenture of Lease contained, and subject to the payment of the same royalties and other payments therein reserved and provided for, and that said Indenture of Lease is accordingly so renewed and extended.

Yours very truly,

(Signed) LEGH R. POWELL.

(Signed) HENRY W. ANDERSON.

As Receivers of Seaboard Air Line Railway Company.

Copy to Mr. W. R. Coker, Mr. E. C. Bagwell, Mr. R. P. Jones, Mr. J. L. Brown.

86 I hereby certify that the foregoing is a true and correct copy of letter dated April 6, 1935, from L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, to United Thacker Coal Co., and Messrs. H. Langdon Laws, Albert H. Cole, and Charles H. Stevens, Jr., Trustees, the original of which letter was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C.,

before the National Bituminous Coal Commission, which said original letter is one of the permanent records of the Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN.

*Custodian of Contracts for Receivers
of Seaboard Air Line Railway Company.*

87

Comptroller's Contract No. 23782-A

This indenture of lease, made this 1st day of May 1934, between United Thacker Coal Company, a corporation of the State of Maine, and authorized according to the laws of West Virginia to hold property and to do business in that State, on the one hand, and H. Langdon Laws, of Cincinnati, Ohio, Albert H. Cole, of Peru, Indiana, and Charles W. Campbell, of Pickaway, West Virginia, Trustees in joint tenancy under and by virtue of a certain Declaration of Trust made and entered into on the 6th day of December 1916, and of record in the office of the Clerk of the Mingo County Court, State of West Virginia, in Deed Book No. 34, page 290, on the other hand (who, as required by said Declaration of Trust, contract as such Trustees and not as individuals), hereinafter called "Lessors," parties of the first part; and Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter called "Lessees," parties of the second part;

Whereas, the Lessees are desirous of acquiring from the Lessors the sole and exclusive right and privilege of extracting and mining coal for their own use from the veins or seams of coal in, upon, or under the boundary or tract of land hereinafter first described, owned by the Lessors, respectively, as hereinafter set out, and of contracting with an independent contractor (hereinafter called the "Contractor") for the service or work of extracting, mining, manufacturing, transporting, and loading said coal at the mine tipple on railroad cars for the Lessees, provided the Lessors will simultaneously and for a period coextensive with the grant to the Lessees of such rights and privileges, grant to the Contractor the right to employ and use in the performance of said service and work all buildings, tipples, and other structures, and all equipment, machinery, improvements, and appurtenances (hereinafter collectively called "improvements") on said premises owned by the Lessors and necessary or convenient for the performance by the Contractor of said service and work; and

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Whereas, the Lessors are willing to grant in and by this Indenture of Lease such rights and privileges to the Lessees

upon the terms, conditions, and provisions hereinafter set forth, and, simultaneously and coextensive with the term of this lease, or any renewal thereof hereinafter provided for, to also grant to the Contractor the right to so employ and use said improvements; now, therefore, this indenture witnesseth:

SECTION 1. That in consideration of the sum of One Dollar (\$1.00), the receipt of which is hereby acknowledged, and the performance and observance of the terms, conditions, covenants, stipulations, and agreements hereinafter set forth to be performed and observed by the Lessees, and reserving as rent the royalties and other payments hereinafter provided to be made by the Lessees, and further reserving to the Lessors for grant to the Contractor as hereinafter provided the said improvements, and subject to all the terms, provisions, and agreements hereinafter mentioned, the Lessors hereby let and lease to the Lessees for the period of fourteen (14) months from the first day of May, 1934, to the first day of July 1935, renewable at the option of the Lessees as hereinafter provided, the following rights and privileges:

A. The sole and exclusive right and privilege of extracting, mining, and removing coal for the Lessees' own use from what is locally designated and known as the Upper Thacker vein or seam of coal in, upon, or under the following described boundary or tract of land, formerly known as the W. J. Pritchard leasehold, situated, lying, and being in Lee District, County of Mingo, State of West Virginia, on the waters of Pigeon Creek, and bounded and described as follows:

89 Beginning at a stake in the southern edge end at the mouth of the Rockhouse Fork bearing S. 8 59 E. 90.43 feet to the "U. S. G. S. B. M." set in a rock at the foot of the point between said Rockhouse Fork and Pigeon Creek, which stake is the second corner of the boundary of land described in that certain Indenture of Lease from the United Thacker Coal Company to Harvey H. Morris bearing date the first day of May, 1920, and recorded in the office of the Clerk of said Mingo County Court in Ponds, Contracts, and Leases Book No. 17, page 174, and which will hereinafter be referred to as the Puritan Coal Corporation lease, said Puritan Coal Corporation having by mesne assignments become the owner of said Indenture of Lease; thence running up Rockhouse Fork with the calls of the Puritan Coal Corporation lease as the same have been re-surveyed and located by C. M. Poor, Engineer.

1. S. 56 14 E. 838.16 feet to a stake.
2. N. 43 35 E. 1,266.18 feet to a stake.
3. N. 83 30 E. 243.83 feet to a double buckeye on the left bank of the creek.

4. S. 20 01½ E. 334.19 feet to an X on a rock near the left edge of the creek.

5. S. 47 35 E. 345.83 feet to an X on a rock 29 feet to the right of a marked chestnut:

6. S. 23 47 E. 314.14 feet to an X on a rock in left edge of the creek.

7. S. 0 15 E. 589.86 feet to a stake on the left bank of the creek.

8. S. 54 17 E. 865.72 feet to an X on a rack on the left bank of the creek.

9. S. 25 48 E. 554.88 feet to a hub on the left bank of the creek.

10. S. 49 54 E. 374.89 feet to a stake.

11. S. 37 07 E. 293.94 feet to a tack in the root of a haw tree.

12. S. 36 22½ E. 209.46 feet to a stake.

13. S. 67 32 E. 327.97 feet to a stake.

14. S. 69 57½ E. 520.47 feet to a stake.

15. N. 87 33 E. 371.43 feet to a stake.

16. N. 59 27 E. 462.63 feet to a stake.

17. S. 84 27 E. 305.18 feet to a stake.

18. N. 73 38 E. 324.73 feet to a stake.

19. N. 15 59 E. 265.81 feet to a stake.

20. S. 86 51 E. 349.57 feet to a stake.

90 21. N. 20 40½ W. 89.02 feet to a stake.

22. S. 72 15 E. 499.00 feet to a stake.

23. N. 80 45 E. 295.00 feet to a stake on the north bank of Rockhouse Fork about 125 feet below the mouth of Fall Rock Branch; thence crossing said Rockhouse Fork and continuing up the south side of Rockhouse Fork, running around the foot of the hill with the Puritan Coal Corporation lease line.

24. S. 23 30 W. 185.00 feet to a stake at the foot of the hill; thence continuing around the foot of the hill with said Puritan Coal Corporation line.

25. S. 78 09 E. 306.44 feet to a stake at the foot of the hill.

26. S. 49 15 E. 164.50 feet to a stake at the foot of the hill witnessed by a 6" willow.

27. S. 29 53 E. 284.48 feet to a blazed 5" poplar on the side of the hill.

28. S. 22 34 E. 176.37 feet to an X on a rock on the side of the hill.

29. S. 48 30 E. 360.00 feet to a stake on the side of the hill witnessed by a 12" leaning apple tree.

30. S. 34 45 E. 139.50 feet to a stake at the foot of the hill, a common corner between said Puritan Coal Corporation leasehold and the leasehold described in that certain Indenture of Lease from the United Thacker Coal Company to the Landstreet Downey Coal Company bearing date the 8th day of December 1921, and recorded in said Clerk's Office in Bonds, Contracts and Leases

Book No. 18, page 432; thence leaving the line of the Puritan Coal Corporation lease and running with the calls of the Landstreet Downey Coal Company leasehold as the same have been resurveyed and located by C. M. Poor, Engineer, crossing said Rockhouse Fork.

31. N. 23 45 E. 578 feet to a stake in the southern edge of the Norfolk & Western Railway Company's right of way, being station 687 plus 00 of said right of way; thence continuing up said Rockhouse Fork, running with the southern boundary line of said right of way which is the northern boundary line of said Landstreet Downey Coal Company lease.

32. S. 78 10 E. 244.40 feet to a stake.

33. N. 82 00 E. 487.35 feet to a stake.

34. N. 61 16 E. 213.69 feet to a stake.

35. N. 40 58 E. 210.20 feet to a stake.

91 36. N. 33 44 E. 298.70 feet to a stake.

37. N. 48 46 E. 317.00 feet to a stake.

38. N. 67 27 E. 177.80 feet to a stake at station 707 plus 13 of said right of way; thence leaving said right of way, and continuing with the Landstreet Downey Coal Company lease, crossing said Rockhouse Fork.

39. S. 20 01 E. 92.64 feet to a stake in the southern edge of Rockhouse Fork; thence up Rockhouse Fork with its meanders, running with the calls of the Landstreet Downey lease as run by O. M. Poor, Engineer.

40. S. 87 32 E. 45.39 feet to an old hub in the southern edge of the creek above an old splash dam.

41. N. 76 18 E. 340.73 feet to a stake.

42. N. 73 00 E. 593.96 feet to a stake.

43. N. 65 15 E. 559.87 feet to a stake on the north side of Rockhouse Fork bearing N. 65 15 E. 165.00 feet to a hickory stump (buckeye gone) on a cliff, which hickory and buckeye are a common corner to the Trustee's Panhandle Coal & Iron Company for tract No. 15 and the Thacker Company's Lewis and L. D. Varney mineral tract No. 18 and John P. Justice mineral tract No. 92, which stake is a corner of the Eldee Junior Coal Company leasehold as the same will hereafter be defined and described; thence leaving said Rockhouse Fork, and running up the hillside on the north side of the creek with said Eldee Junior Coal Company lease line—adopting for the remaining calls of the leasehold boundary a survey made in the spring of 1923 by C. L. Vickers, Engineer, for the joint use of the Thacker Company and the Trustees.

44. N. 23 50 W. 1,470.00 feet to an X in the edge of a large rock on north side of Justice Hollow (oak, mulberry, and dogwood called for gone), ninth corner of said John P. Justice min-

eral tract No. 92; thence running across said Panhandle Coal & Iron tract.

45. N. 56 02 E. 992.89 feet to a large chestnut oak on top of the ridge, on the Elk Creek side thereof, witnessed by four painted hickories, the tenth corner of said Lewis & L. D. Varney Mineral Tract No. 18.

46. N. 71 52 E. 2,773.29 feet to a set stone between a beech and maple standing on the ridge about 93 feet northeast of where the road crosses the ridge in the gap between Varney Branch and Middle Fork of White Oak Branch; thence continuing up the ridge.

47. N. 68 31 E. 207.40 feet to a chestnut and black oak on the ridge; thence

92 48. N. 77 30 E. 1,256.77 feet to a chestnut oak on the ridge, common corner to the Trustees' Buchanan Tract and the Thacker Company's Lewis and L. D. Varney mineral tract No. 18 and Martha Chafin mineral Tract No. 21; thence running across said Buchanan tract.

49. N. 62 56 E. 1,634.69 feet to 2 chestnuts on a point on the upper side of Milligan Hollow, the second corner of the Thacker Company's Anderson Cary mineral tract No. 19; thence with the line between said Anderson Cary and Buchanan tract.

50. N. 21 35 E. 909.21 feet to a stake at foot of hill (2 poplar stumps called for).

51. N. 20 37 E. 244.23 feet to a stake in the line of the Arthur White 44-acre survey of October 19th, 1842, witnessed by a beech (beech corner called for gone).

52. N. 62 54 W. 159.14 feet to a set stone, a corner to said Arthur White 44-acre survey (beech called for gone); thence

53. N. 67 07 W. 890.56 feet to a stake, bearing S. 53 57 W. 26.31 feet to a white oak, mulberry, dogwood, and chestnut corner of the Trustees' Buchanan Tract; thence

54. N. 62 26 W. 1,953.00 feet to a white oak stump, a corner of the said Arthur White 44-acre survey; thence

55. S. 52 13 W. 120.27 feet to a stake by the creek (birch and dogwood called for gone); thence

56. N. 16 50 E. 2,782.77 feet to a large sycamore and 3 beeches, the ninth corner of the Thacker Company's W. A. Farley mineral tract No. 23; thence with the back or northern calls of said Thacker Company's W. A. Farley mineral tract No. 23, Thos. B. Farley mineral tract No. 24, William Curry mineral tract No. 25 and S. F. Curry mineral tract No. 26.

57. N. 5 16 W. 679.79 feet to a gum and poplar on a bench, beech witness; thence

58. N. 67 25 W. 471.21 feet to a black pine on a point, witnessed by a small white oak; thence

59. N. 2 28 W. 821.50 feet to a chestnut oak in the head of a hollow; thence

60. S. 77 13 W. 1,386.66 feet to three black oaks on a point (one down); thence

61. N. 15 43 W. 600.06 feet to a dogwood and large red oak in a hollow below a rock cliff; thence around the hillside down Elk Creek.

62. S. 73 11 W. 1,291.04 feet to a black oak 18 inches in diameter on a point 50 feet below a small cliff; thence

63. N. 5 26 W. 431.69 feet to a double chestnut oak in the head of a drain; thence continuing down said creek around the hillside.

93. 64. S. 49 44 W. 1,908.25 feet to a small white oak and pine stump on the bank of creek, a corner to said Thos. B. Farley mineral tract No. 24; thence with the calls of said Thos. B. Farley tract reversed.

65. N. 28 59 E. 517.68 feet to a small set stone in the head of a hollow witnessed by an elm and a triple butternut; thence

66. S. 75 29 W. 670.41 feet to a stake on hillside (black oak called for); thence

67. N. 27 33 W. 802.33 feet to a dogwood and two beeches witnesses (white oak called for gone); thence

68. N. 57 55 W. 661.93 feet to a stake in a cleared field (beech called for gone); thence

69. N. 35 05 E. 330.01 feet to a stake (white oaks called for gone); thence

70. N. 63 32 W. 774.87 feet to a spruce pine stump near the mouth of a hollow of Five Mile Fork; thence

71. N. 7 32 E. 581.82 feet to a beech and maple on hillside; thence

72. N. 86 09 W. 1,758.60 feet to a cucumber (down) with two hickories, gum, and dogwood witnesses 18 feet from a rock; thence

73. S. 32 50 W. 1,804.61 feet to a black walnut corner of said William Curry mineral tract No. 25, and with call of same.

74. N. 14 44 E. 1,164.50 feet to a black oak on a ridge below a cliff, beginning corner to said S. F. Curry mineral tract No. 26, and with the calls of same.

75. N. 36 37 W. 2,692.31 feet to two beeches on the east bank of Hurricane Branch and at the forks of same.

76. N. 89 52 W. 320.00 feet to a dogwood and rock witnessed by a dogwood and beech.

77. S. 8 18 W. 1,072.08 feet to a large beech.

78. S. 21 56 E. 231.46 feet to a gum.

79. S. 23 31 W. 613.83 feet to a white oak.

80. S. 76 30 W. 338.01 feet to a black oak on the side of a point.

81. N. 82 37 W. 642.78 feet to a red oak stump and a beech.

82. S. 86 44 W. 659.27 feet to a hickory and black jack.

83. S. 8 05 W. 185 feet to a stake, being the "two Beeches" corner called for as the tenth corner of said S. F. Curry mineral tract No. 26; and continuing with the lines of said tract.

94 84. S. 69 37 E. 325.43 feet to a stake (white oak and beech called for).

85. S. 35 48 W. 235.36 feet to a stake on the south bank of Elk Creek (Sassafras called for), and down Elk Creek.

86. S. 49 44 W. 298.20 feet to a stake on creek bank.

87. S. 4 24 W. 218.72 feet to a stake.

88. S. 24 26 E. 281.21 feet to a stake between two beeches on a small bench.

89. S. 76 21 W. 517.12 feet to a stake bearing S. 84 W. 20 feet to a poplar stump witnessed by a butternut.

90. S. 43 06 W. 301.34 feet to a cucumber witnessed by a beech, dogwood, and hickory.

91. S. 18 56 W. 213.92 feet to a hickory on the ridge witnessed by a chestnut; then running up said ridge.

92. S. 70 15 E. 888.50 feet to a small service on a cliff (locust called for gone).

93. S. 53 20 E. 281.85 feet to a chestnut oak on the ridge.

94. N. 86 12 E. 76.98 feet to a chestnut oak snag on a cliff, a corner of said William Curry Mineral Tract No. 25 and with one call of same.

95. S. 15 02 E. 2,173.50 feet to a stake on a knob (chestnut oak called for gone) witnessed by two chestnut oaks, maple, and black oak; thence

96. S. 49 30 W. 612.00 feet to a large black gum on center of ridge between Elk Creek and Millstone Branch of Pigeon Creek, witnessed by two cucumbers and a poplar, corner to the Trustees' lands, and with the northern lines of same.

97. N. 55 54 W. 2,439.43 feet to two chestnut oaks on northern edge of ridge witnessed by a white oak; thence continuing down said ridge.

98. S. 78 18 W. 765.79 feet to two chestnut oak stumps on a high knob witnessed by two black oaks and three bunches of chestnut sprouts; thence leaving said ridge between Millstone Branch and Elk Creek and running down on the Elk Creek side.

99. N. 26 35 E. 790.73 feet to a stake in a stone pile on a bench in a field (beech and sugar tree stumps called for gone) witnessed by two apple trees bearing S. 40 30 W. 17 feet and N. 31 45 W. 28 feet; thence

100. N. 30 03 W. 431.53 feet to two lynns on a point; thence
101. S. 81 56 W. 374.88 feet to a gum and white oak snags on a point; thence
- 25 102. S. 30 29 W. 703.76 feet to two lynns (one down) in head of a hollow, witnessed by a beech; thence
103. N. 47 54 W. 639.33 feet to a beech and white oak stump by and just below a fence; thence
104. S. 53 48 W. 461.38 feet to a leaning beech on the west side of a point; thence
105. S. 31 33 W. 602.15 feet to a beech in the head of a hollow (dogwood gone); thence
106. N. 73 13 W. 613.83 feet to a stake in a stone pile; thence
107. N. 55 43 W. 77.28 feet to a stake in a stone pile on a knob; thence
108. N. 18 23 W. 306.26 feet to a white oak and hickory (hickory fallen) on a point, corner to a four-acre tract; thence
109. N. 32 29 W. 769.58 feet to a stake in Elk Creek (double Sycamore called for) corner Harvey Curry; thence running down Elk Creek with its meanders, and cutting through said Trustees' B. R. Bias Trustee 264.6-Acre Tract.
110. S. 46 34 W. 687.79 feet to a stake; thence
111. N. 73 00 W. 193.80 feet to a stake; thence
112. N. 25 00 W. 1,914.55 feet to a stake at the mouth of Elk Creek; thence running up Pigeon Creek with its meanders.
113. S. 27 01 W. 704.29 feet to a stake.
114. S. 15 31 E. 940.90 feet to a stake; thence leaving said Pigeon Creek and running up the hillside on the East side of Pigeon Creek with the outside lines of the Trustees' tracts as said lines run around Millstone Branch.
115. S. 76 05 E. 430.60 feet to a set stone (beech called for).
116. S. 76 14 E. 494.12 feet to a set stone.
117. N. 53 21 E. 198.36 feet to a stake witnessed by a beech, black oak, and dogwood.
118. S. 57 49 E. 2,635.36 feet to a set stone on the south bank of Millstone Branch (three beeches and buckeye stump called for).
119. S. 81 11 W. 1,730.73 feet to a set stone where a hickory stood on side of point, witnessed by a dogwood, black oak, and beech.
120. S. 64 19 W. 1,364.35 feet to two white oaks on a ridge, witnessed by a sugar tree, a corner to the Trustees' B. R. Bias Trustee et al. 584.4-acre tract, also the fifth corner of the Thacker Company's P. A. Farley mineral tract No. 16;
- 96 thence leaving the lands of the Trustees and running with two calls of said mineral tract No. 16.

121. S. 23 30 W. 1,219.67 feet to a stake on the Norfolk & Western Railway Company's right of way, near the bank of Pigeon Creek, white oak called for; thence running up Pigeon Creek.

122. S. 65 11 E. 184.64 feet to a stake at the mouth of Dark Hollow, a corner to the Thacker Company's Celia A. Farley fee tract No. 134; thence with one call of said last mentioned tract reversed.

123. S. 43 30 W. 48.28 feet to a stake near the center of Pigeon Creek opposite the mouth of Dark Hollow; thence up the east bank of Pigeon Creek.

124. S. 48 45 E. 637.45 feet to a stake in the east edge of creek.

125. S. 16 15 E. 488.00 feet to a stake on east side of creek.

126. S. 9 26 W. 499.80 feet to a stake at the mouth of a hollow.

127. S. 22 05 W. 538.42 feet to a stake in the east edge of creek.

128. S. 2 46 E. 497.25 feet to a stake in the east edge of the creek.

129. S. 48 41 E. 224.00 feet to a stake in the east edge of the creek, witnessed by a steel rail set in concrete bearing N. 67 10 E. 284.40 feet.

130. S. 69 27 E. 665.50 feet to a stake in the east edge of the creek.

131. S. 58 25 E. 511.65 feet to a stake in the east edge of the creek.

132. S. 36 05 E. 591.00 feet to the beginning, and containing 4,095.06 acres, from which there is excluded a tract of land situate and lying on both sides of the Fall Rock Branch of Rockhouse Fork and bounded and described as follows, to wit:

Beginning on a spruce pine stump standing on the northeast side of said Fall Rock Branch, about 525 feet up the same, witnessed by a buckeye and black oak, said spruce pine stump being a corner of the Hiram McCoy 175-acre survey dated February 16th, 1849, and a corner of the Thacker Company's Jas. M. Curry fee tract No. 17; thence crossing said Fall Rock Branch, and running around the hillside down said Rockhouse Fork.

1. N. 87 47 W. 671.71 feet to a white oak and beech; thence continuing around the hillside and down Rockhouse Fork.

2. N. 65 01 W. 449.81 feet to an X on a rock on the east side of a hollow (lynn and dogwood called for) witnessed by an elm, white oak, ash, and walnut; thence continuing around the hillside.

3. S. 77 51 W. 756.36 feet to a white oak on a point opposite the house in which Stanley Vernatter now lives, witnessed by a black oak; thence running up the hillside.

4. N. 3 29 E. 1,557.01 feet to a set stone on the west side of a point on the lower side of a bench, witnessed by two small black oaks, two small chestnut oaks and a 10 inch white oak; thence running around the hillside up said Rockhouse Fork, crossing said Fall Rock Branch.

5. S. 75 54 E. 3,195.56 feet to a beech and gum in the head of a drain.

6. S. 54 56 W. 1,419.68 feet to the beginning, and containing 69 acres, more or less; leaving embraced in the aforesaid leasehold, after deducting said 69-acre exclusion, Four Thousand, Twenty-six and Six one-hundredths (4,026.06) acres which is hereby leased and let, which said 69-acre tract, however, shall be added to said 4,026.06 acre leasehold boundary, subject to all and several the terms and provisions of this indenture, if, as and when (it still being economically feasible to mine and remove the coal underlying said 69-acre tract in connection with that underlying said leasehold boundary) said 69-acre tract has been redeemed or acquired by the United Thacker Coal Company from the State of West Virginia:

Subject, nevertheless, to such rights of way and easements as the Lessors, or either of them, have heretofore granted to the Norfolk & Western Railway Company, the Appalachian Electric Power Company, and or to the State of West Virginia and any of its political governmental subdivisions.

98. Said leasehold boundary is composed of various and sundry tracts and parts of tracts of lands and minerals now owned in severalty by the said United Thacker Coal Company and the said Trustees, respectively, in fee simple absolute as follows:

Tracts Owned by the United Thacker Coal Company

First Tract: So much of that certain tract described in the deed from Celia A. Farley and husband to the United Thacker Coal Company, bearing date the 30th day of April 1902 and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 15, page 242, as lies on the east side of main Pigeon Creek, and estimated to contain 40 acres.

Second Tract: So much of that certain tract described in the deed from P. A. Farley et al. to James E. Price, Trustee, bearing date the 28th day of March 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book "L," page 195, as lies on the east side of Pigeon Creek and on the north side of Rockhouse Fork, and estimated to contain 290 acres.

Third Tract: So much of that certain tract described in the deed from J. W. McCoy et al. to Arthur D. Bright, Trustee, bear-

ing date the 3rd day of September 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book "L," page 297, as lies on the north side of Rockhouse Fork, and estimated to contain 300 acres.

Fourth Tract: So much of that certain tract described in the deed from John B. Floyd and wife to Henry R. Phillips, Trustee, bearing date the 4th day of April 1892, and recorded in the office of the clerk of the Logan County Court in Deed Book "M," page 227, as lies on the north side of Rockhouse Fork, and estimated to contain 22 acres.

Fifth Tract: So much of that certain tract described in the deed from James M. Curry and wife to Arthur D. Bright, Trustee, bearing date the 4th day of September 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book "O," page 199, as lies north of calls 22 to 35, both inclusive, of the above-described leasehold boundary.

Sixth Tract: Situate on the north side of Rockhouse Fork and adjoining the next above-described tract of land on the east, being the same tract described in the deed from John P. Justice and wife to William Kronenwett bearing date the 13th day of February 1901, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 8, page 46, and containing in its entirety 73.27 acres from which there is excepted, however, a strip of land lying between the Norfolk & Western Railway's right of way and Rockhouse Fork and extending for length from said Railway Company's station No. 697 plus 36 to station No. 707 plus 13.

Seventh Tract: Situate on the Skin Poplar Hollow of Elk Creek, and on both sides of the Middle Fork of Elk Creek, to the north of the last above-described tract, and being the same tract of land described in the deed from Martha Chafin, widow, to Henry R. Phillips, Trustee, bearing date the 30th day of March 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book "N," page 354, and containing 231 acres, more or less.

Eighth Tract: Situate on the left-hand side of the Right Fork of Elk Creek, to the west of the tract last above described, and being the "4th Tract" described in the deed from William Straton and wife to Egbert Mills, Jr., Trustee, bearing date the 24th day of April 1890, and recorded in the office of the clerk of the Logan County Court in Deed Book "L," page 419, and containing 199.5 acres, more or less.

Ninth Tract: Situate on both sides of Elk Creek, to the north of the two tracts next preceding, and being the same tract described in the deed from William A. Farley and wife to Henry R.

Phillips, Trustee, bearing date the 29th day of March 1889 and recorded in the office of the clerk of the Logan County Court in Deed Book "N," page 363, and containing 512 acres, more or less.

Tenth Tract: Situate on both sides of Elk Creek, to the west of the tract next preceding, and being the tract described in the deed from Thomas B. Farley and wife to Henry R. Phillips, Trustee, bearing date the 29th day of March 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book "L," page 159, and containing 307 acres, more or less.

Eleventh Tract: Situate on both sides of Elk Creek and of the Laurel Branch thereof, to the west of the tract next preceding, and being the same tract described in the deed from William Curry and wife to Arthur D. Bright, bearing date the 12th day of September 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book "L," page 295, and containing 398.75 acres, more or less.

Twelfth Tract: Situate on both sides of Elk Creek, to the north and northwest of the tract next preceding, and being the same tract described in the deed from Samuel F. Curry and wife to Henry R. Phillips, Trustee, bearing date the 25th day of March 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book "L," page 157, and containing 229 acres, more or less.

Thirteenth Tract: Situate on the north side of said Rockhouse Fork, between the second and third tracts above described, and being the same tract described in the deed from Lula Curry and W. J. Curry, her husband, to the said United Thacker Coal Company bearing date the 12th day of July 1922, and recorded in the office of the Clerk of said Mingo County Court in Deed Book No. 45, page 530, and containing 15 acres, more or less.

Tracts Owned by the Cole & Crane Trustees

First Tract: Situate on the north side of Rockhouse Fork, adjoining the United Thacker Coal Company's third and fourth tract: above described, and being "Tract No. 5" in the deed from John H. Holt et al. to James H. Cole et al. bearing date the 16th day of November 1908, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 22, page 535, and containing 109 acres, more or less.

100 Second Tract: Situate above and on the head of the Fall Rock Branch of Rockhouse Fork and the head of the Millstone Branch of Pigeon Creek, and being "Tract No. 4," described in said last-mentioned deed, and containing 244.50 acres, more or less, from which is excepted, however, a triangular parcel of land

on the right-hand side of the John P. Justice Branch containing 16.22 acres, more or less.

Third Tract: Situate on the head of the Right Fork of Elk Creek, adjoining the tract last above described, and being the same tract described in the deed from S. S. Altizer, Trustee, et al. to James O. Cole et al., bearing date the 9th day of June 1906, and recorded in said clerk's office in Deed Book No. 18, page 371, and containing 195 acres, more or less.

Fourth Tract: Situate on a right-hand fork of the Right Fork of Elk Creek, adjoining the tract last above described, and being "Tract No. 3" described in the aforesaid deed from John H. Holt et al. to James O. Cole et al., and containing 83.75 acres, more or less.

Fifth Tract: Situate on a right-hand fork of the Right Fork of Elk Creek, adjoining the tract last above described on the west, and being "Tract Number Four" described in the deed from Henry A. McCarthy, Trustee, to James O. Cole et al., bearing date the 7th day of April 1908, and recorded in said Clerk's office in Deed Book No. 22, page 197, and containing 61 acres, more or less.

Sixth Tract: Situate on the Harden Branch of Elk Creek, to the north of the tract last above described, and being the tract described in the deed from James A. Farley and wife to James O. Cole et al., bearing date the 6th day of June 1912, and recorded in said clerk's office in Deed Book No. 27, page 114, and containing 70.27 acres, more or less.

Seventh Tract: Situate on Millstone Branch of Pigeon Creek, adjoining on the west the second tract of the said Real Estate Trust hereinabove described, and being "Tract Number Two" described in the deed from B. R. Biss, Trustee, et al. to James O. Cole et al., bearing date the 16th day of May 1908, and recorded in said clerk's office in Deed Book No. 22, page 225, and containing 584.4 acres, more or less.

Eighth Tract: Situate on the ridge between said Millstone Branch and the Johnson McCoy Branch of Rockhouse Fork, adjoining on the south the tract last above described, and being "Tract No. Two" in the aforesaid deed from Henry A. McCarthy to James O. Cole et al., and containing 34 acres, more or less.

Ninth Tract: Situate on the crest of the ridge between said Millstone Branch and Elk Creek, adjoining on the north the seventh tract of said Real Estate Trust, and being the tract described in the deed from Joseph F. Paull et al. to James O. Cole et al., bearing date the 25th day of May 1908, and recorded in said office in Deed Book No. —, page —, and containing 10.8 acres, more or less.

Tenth Tract: Situate on the ridge between said Millstone Branch and Elk Creek, adjoining on the north the "Seventh Tract" of said Real Estate Trust hereinabove described, and being "Tract Number One" described in the aforesaid deed from

Henry A. McCarthy, Trustee, to James O. Cole et al., and
101 containing 67 acres, more or less.

Eleventh Tract: Situate on the ridge between said Millstone Branch and Elk Creek, adjoining on the west the last above-described tract, and being "Tract No. 2" described in the aforesaid deed from John H. Holt et al., to James O. Cole et al., and containing 65.39 acres, more or less.

Twelfth Tract: Situate at the forks of Pigeon Creek and Elk Creek, adjoining on the west the last above tract, and being so much of "Tract No. 1" described in the aforesaid deed from B. R. Biss, Trustee, et al. to James O. Cole et al., as lies on the south side of Elk Creek and on the east side of Pigeon Creek, and estimated to contain 50 acres.

Thirteenth Tract: Situate on both sides of the Middle Fork of Elk Creek, between the United Thacker Coal Company's Anderson Cary 119-acre mineral tract No. 19 and said Company's seventh tract hereinabove described, and being the tract described in the deed from John H. Holt et al. to James O. Cole et al., bearing date the 4th day of May 1907, and recorded in said Clerk's Office in Deed Book No. 20, page 499, and containing by resurvey 79.11 acres, more or less, from which is excepted, however, 14.79 acres off of the southeastern corner of said tract.

B. Also, and as included in the aforesaid rights and privileges, the right and privileges of contracting with an independent contractor for performance for the Lessees of the service and work of extracting, mining, removing, manufacturing, transporting, and loading said coal at the mine tippie on railroad cars for shipment to or upon the order of the lessees.

C. Also the right and privilege of making said coal into coke and other products of coal, and of preparing for market, using, transporting, shipping, and selling said coal and coke and other products of coal.

D. Also the privilege of occupying and using so much of the surface of the following described lands, and of using so much of the stone, sand, water, and timber therein and thereon, and of making therein and thereon such excavations and improvements of whatever nature, as may be necessary in the proper exercise and enjoyment of the rights and privileges herein let and leased, but for no other purpose, said lands being the following

tracts or parcels of land, lying and being in the County of
102 Mingo, State of West Virginia, on the waters of Pigeon Creek, and bounded and described as follows:

United Thacker Coal Company's Surface Tracts

First Tract: Being the same as the "First Tract" of said company hereinbefore stated as being embraced in the above-described leasehold boundary, subject, however, to the right of the United Thacker Coal Company to use the bottom and rolling lands on the east side of Pigeon Creek, both above and below the Irve Hollow, in connection with any operations said company of its assigns may conduct on said Rockhouse Fork and Pigeon Creek.

Second Tract: Situate on the east of and adjoining the tract next above described, and being the tract described in the deed from J. K. Anderson and wife to the United Thacker Coal Company bearing date the 27th day of June 1906, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 19, page 14, and containing 10.12 acres, more or less, and overlying a part of the "Second Tract" of said company hereinbefore stated as being embraced within the leasehold boundary.

Third Tract: Being the same as the "Thirteenth Tract" of said company hereinbefore stated as being embraced in the leasehold boundary.

Fourth Tract: A tract of 60.78 acres situate on the north side of said Rockhouse Fork, on the Pemberton Branch thereof, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the leasehold boundary, it being the "First Tract" described in the deed from Lula Curry and W. J. Curry, her husband, to the United Thacker Coal Company, bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 527, subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained.

Fifth Tract: A tract of 114.03 acres situate on the north side of said Rockhouse Fork, and on the Johnson McCoy Branch thereof, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the leasehold boundary, it being the same tract of land described in the deed from Boyd Maynard and wife to the United Thacker Coal Company, bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 538; subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained.

Sixth Tract: A tract stated as containing 25 acres, but in fact containing only about one-half said number of acres, situate on the south side of Rockhouse Fork, overlying a part of the "Second Tract" hereinbefore stated as being embraced in the

above-described leasehold boundary, and being the same tract described in the deed from Rockhouse Land Company to the United Thacker Coal Company, bearing date the 15th day of February 1922, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 45, page 533; subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained.

103 Seventh Tract: A tract containing 59.34 acres, situate on both sides of Rockhouse Fork, adjoining the Fourth, Fifth, and Sixth Tracts next above described, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, being the "Second Tract" described in the above-mentioned deed from Lula Curry, and W. J. Curry, her husband, bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 527, subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained, and specifically excepting such rights as were conveyed by the United Thacker Coal Company to John Maynard by deed bearing date the 10th day of April 1923, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 48, page 117, in a tract containing 3.5 acres, more or less, and situate along the south bank of Rockhouse Fork opposite the Pemberton and Johnson McCoy Branches, and lying within said 59.34-acre tract.

Eighth Tract: A tract containing 54.72 acres, situate on the south side of said Rockhouse Fork, to the southeast of and adjoining the next preceding tract, likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, it being the same tract of land described in the deed from Wade H. Bronson, Special Commissioner, to the United Thacker Coal Company bearing date the 13th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 525, and likewise in the deed from James A. Farley and wife to the United Thacker Coal Company bearing date the 13th day of July 1922, and recorded in said office in Deed Book No. 45, page 523; subject, nevertheless, to all the reservations, exceptions, and conditions in said two deeds set out and contained.

Ninth Tract: A tract containing two acres, more or less, situate on the north side of Rockhouse Fork, and likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, conveyed to the United Thacker Coal Company by John Maynard and wife by deed bearing date the 10th day of April 1923, and recorded in

the office of the clerk of the Mingo County Court in Deed Book No. 48, page 105.

Tenth Tract: So much of that certain tract, likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, that was conveyed to the United Thacker Coal Company by John Maynard and wife by deed bearing date the first day of October 1919, and recorded in the office of the Clerk of the Mingo County Court, in Deed Book 38, page 579, as lies on the north side of said Rockhouse Fork, and containing 18.28 acres, more or less.

Eleventh Tract: Being the same as the "Fourth Tract" of said Thacker Company hereinbefore stated as being embraced in the above-described leasehold boundary.

Twelfth Tract: Being the same as the "Fifth Tract" of said Thacker Company hereinbefore stated as being embraced within the above-described leasehold boundary.

Thirteenth Tract: Situate on the headwaters of the Right Fork of Elk Creek, and being the tract described in the deed 104 from James R. Danron et al to William Kronenwett, bearing date the 9th day of February 1901, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 7, page 107, the boundary lines of which are coterminous, or nearly so, with the boundary lines of the "Eighth Tract" of said United Thacker Coal Company hereinbefore stated as being embraced within the above-described leasehold boundary, and containing 206.5 acres, more or less.

Provided, however, that the rights given the Lessees with respect to the use of the surface of the "Sixth" and "Eighth" tracts last hereinabove described, as well as of such portion of the "Seventh" tract last hereinabove described as lies on the south side of said Rockhouse Fork, shall be limited and restricted to the bottom land lying along the south bank of said Rockhouse Fork, and to such hillside land contiguous to said bottom land as is adapted to and suitable for building purposes; it being understood and agreed, however, that the United Thacker Coal Company reserves to itself, its successors and assigns, the right to mine coal from under but not to prepare or handle the same upon said bottom and contiguous hillside land, including specifically the right to drive air courses and drainage and timber holes from under the ground out to the surface, with rights of ingress, egress, and regress to said air courses and drainage and timber holes, and the further right to maintain thereon the electric transformer station now located thereon, the rights thus reserved to not unreasonably interfere, however, with any miners' houses and appurtenant buildings which the Lessees, their suc-

cessors, and assigns may have erected upon said bottom and contiguous hillside land.

And provided, moreover, that the rights given the Lessees under this paragraph shall be subject to the terms of that certain indenture of writing from the United Thacker Coal Company to the Puritan Coal Corporation bearing date the 20th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Bonds, Contracts, and Leases Book No. 19, page 246, wherein and whereby there was let and leased unto said Puritan Coal Corporation certain rights and privileges with respect to a tract of land situate on the north side of the Rockhouse Fork which is more particularly bounded and described, as follows, to wit:

Situate between stations 623 and 650 of the center line of the Norfolk & Western Railway Company's right-of-way, and extending from the center of the Rockhouse Fork between radial lines drawn through said respective right-of-way stations back to points on the hillside north of Rockhouse Fork so as to embrace within said parcel of land all the bottom and contiguous hillside land, within the limitations herein defined, that is adapted to side-track, plant, and general building purposes; there being let and leased hereby to the Lessees, however, all rights reserved to the United Thacker Coal Company in said indenture of writing of July 20, 1922, to the Puritan Coal Corporation, and in particular the right to mine the coal from under but not to prepare and handle the same upon said last-described tract of land, and the right to drive air courses and drainage and timber holes from under the ground to the surface, with rights of ingress, egress, and regress to said courses and holes, insofar as the exercise of said rights do not unreasonably interfere with the uses to which the said Puritan Coal Corporation, its successors and assigns, are by said indenture of writing authorized to put the surface of said tract or parcel of land.

The Cole & Crane Trustees' Surface Tracts

The "First" to the "Twelfth" tracts, both inclusive, of said Real Estate Trust hereinbefore described as being embraced within the principal leasehold boundary.

The Lessees shall not have any right to use, or permit the use of, the surface of any other lands than those next above described for the exercise, use, and enjoyment of the rights and privileges herein let and demised. Except always that the Lessees shall have the right of using, or permitting the Contractor the use of, in connection with the exercise of such rights and privileges, such surface and mining rights as

belong to any mineral tract included in the tract or parcel of land first described in this lease.

Excepting and reserving, however, on all of the lands hereinbefore described, all boundary, corner, or line trees, and all trees which may be selected and designated as provided in Section 3 hereof.

And Excepting and Reserving, moreover, to the United Thacker Coal Company, from the timber on the "Eighth Tract" hereinbefore listed and described under the topical heading "Tracts owned by the United Thacker Coal Company" all trees which at the date of this lease measure sixteen (16) inches or over in average diameter over the bark three (3) feet from the ground on the upper side of the tree. And except further that the right and privilege given by this indenture to the Lessee to use timber as hereinbefore specified is subject to the right of the Lessors, their respective vendees, grantees, and assigns, which right is hereby reserved to them, respectively, to cut and use from and of said timber such hickory, beech, buckeye, and lynn trees, which at the date of cutting measure less than twelve (12) inches in average diameter over the bark three (3) feet from the ground, as the Lessors, their respective vendees, grantees, or assigns, may desire for haulroads, tramroads, haulways, skidways, and backing, necessary, proper, or convenient in cutting and removing the timber not included in this lease and any and all other timber upon any of the lands now owned or claimed by the Lessors in Mingo and Logan Counties, West Virginia, and also the beech below twelve (12) inches in average diameter, measured over the bark three (3) feet above the ground at the time of cutting, for the purpose of constructing tramroads, tramways, and other
 107 necessary roads and ways in connection with any logging operation that the Lessors or their respective vendees, grantees, or assigns, may conduct upon any of the lands now owned or claimed by the Lessors, respectively, or that they may acquire from third parties in Mingo County, West Virginia.

It is understood and agreed that the rights and privileges herein let and leased are limited to such rights and privileges as the respective Lessors possess and have the lawful right to let and lease, and where the Lessors own the minerals and appurtenant rights only, this lease does not let and lease any rights and privileges whatsoever other than such as are granted to the respective Lessors in and by the deeds under which they respectively claim the said minerals and appurtenant rights; and this lease is made subject to any and all exceptions and reservations contained in any of said deeds.

Excepting and reserving to the Lessors, respectively, as their several interests and ownerships appear, the entire ownership and control of all the lands herein described, and the coal, stone, sand, water, timber, and other minerals, products, and substances therein and thereon, for all purposes except those hereinbefore expressly set forth, which exception and reservation shall include, but not as a limitation thereof, the right and privilege of using, selling, or otherwise disposing of, any surface not occupied by the Lessees hereunder or by the Contractor, and of letting leases to tenants for the purpose of occupying and farming said surface; the right and privilege of searching for, mining, and removing coal from any and all veins or seams, or portion or portions thereof, the right and privilege of mining which is not herein expressly let and leased; the right and privilege of making coke and other products of coal, and of preparing for market, using, transporting, shipping, and selling coal and coke and other products of coal; the right and privilege of growing
 108 timber and of cutting, preparing, using, or removing any timber the right and privilege of using which is not herein expressly let and leased; the right and privilege of searching for coal, oil, gas, or any other minerals, products, or substances and removing the same when found; the right and privilege of draining water, transmitting electrical energy, and transporting coal or coke or other products of timber, coal, oil, gas, or other minerals and products, and materials and goods of all other kinds, from said lands, or any other lands, over, across, or through the lands herein described; the right and privilege of using the stone, sand, water, and material in and on said lands, of making excavations and sinking or boring slopes, shafts, drifts, tunnels, and wells, of erecting buildings, structures, machinery, and improvements, of constructing ditches, transmission lines, railroads, or other roads, tramways, tubing, pipe lines, or other means of drainage, transmission, or transportation over, upon, or beneath the surface of said lands, and of selecting and granting rights of way therefor, together with full and free rights of ingress, and egress, as may be necessary or convenient in the proper development of the same or other lands, or in the proper exercise of the rights and privileges hereby excepted and reserved; and the right to grant and convey from time to time to any railroad or railway company so much of the lands herein described as may be required by said railroad or railway company for rights of way or other railroad or railway purposes; and any or all of said rights and privileges shall inure to the benefit of and may be exercised and enjoyed by the Lessors and their assigns and its or their other lessees or other agents or attorneys; pro-

vided, however, that the rights and privileges hereby excepted and reserved shall be exercised with due regard for the requirements, convenience, and safety of the operations hereunder of the Lessees and the Contractor, and that the Lessees here-
 109 under shall be properly compensated for any actual damage accruing to them in the exercise of any of the rights and privileges hereby excepted and reserved.

SECTION 2. The Lessors will, simultaneously with the delivery of this lease, execute and deliver to the Contractor an Indenture of Lease whereunder and whereby the Lessors will demise and let to the Contractor for a term or period coextensive with the term or period of this lease and renewable for the further period or periods as hereinafter in this lease provided, the right and privilege of using and employing in the performance by the Contractor of the service and work of extracting, mining, removing, manufacturing, transporting, and so loading said coal for the Lessees, all of the said improvements now or hereafter located on said land and used as part of the Contractor's plant and operations.

SECTION 3. The Lessees shall not cut any boundary, corner, or line trees, nor any black walnut or poplar trees, of any size or dimensions whatsoever, nor such trees of other species as may be selected and designated by the Chief Engineer of the Lessors to be left as seedlings.

SECTION 4. The Lessees shall not purchase, lease, or otherwise acquire any lands or interests in lands within the boundaries of or adjacent to the lands herein described, without the consent of the Lessors in writing for that purpose being first had and obtained.

And the Lessees will not use or permit to be used any of the lands hereinbefore described except for the purposes of this lease and in accordance with the terms and provisions thereof.

SECTION 5. The Lessees shall not transport into, over, through, or under the lands herein described, or ship from said
 110 lands, any coal mined by the Lessees from other lands, or any coke or other product of coal manufactured from coal mined by the Lessees from other lands, without the consent of the Lessors in writing for that purpose being first had and obtained.

SECTION 6. The Lessees shall pay to the Lessors monthly, as rent, a royalty of nine cents (9¢) for each and every ton of coal of 2,000 pounds mined and shipped from or used on said premises by the Lessees or by the Contractor for account of the Lessees, the royalty on coal mined during any calendar month to be paid on or before the twenty-fifth (25th) day of the next succeeding month.

SECTION 7. For the twelve months beginning July 1, 1934, and for each year after June 30, 1935, of any extension or renewal of this lease, the Lessees shall pay to the Lessors, as a minimum annual rental hereunder, the sum of Sixteen Thousand Two Hundred Dollars (\$16,200.00), which said sum is the product derived by multiplying the aggregate minimum of 180,000 tons of 2,000 pounds of coal which the Lessees agree to direct the Contractor to mine, produce, and load for their account during said twelve months' period, by nine (9c) cents per ton; provided, however, that said annual minimum rental shall be reduced by a sum equal to the product derived from multiplying by nine cents per ton of 2,000 pounds the aggregate number of tons of 2,000 pounds under 180,000 tons, if any, which the Lessees, through no act or fault of their own, shall not have caused to be mined and shipped from said premises during said year; provided, always, however, that the minimum annual rental payable hereunder shall in no event be less than \$10,000; and provided, further, that in the event of the termination of this lease pursuant to any of the provisions hereof (except for default of the Lessees hereunder) or by mutual consent of the parties hereto, prior to the expiration of the then current lease year, the minimum rentals 111 due and payable by the Lessees under this lease shall be such proportion of said above specified minimum rentals as the period of such lease year during which this lease shall at the time of such termination have continued in effect, shall bear to the period of one year.

All minimum rentals due and payable hereunder shall be paid in equal quarterly installments on the twenty-fifth days of October, January, April, and July of each year. If the amount of tonnage royalties provided for in Section 6 hereof for any quarter does not equal the minimum annual rental to be paid for such quarter, such payment of the minimum annual rental shall be deemed and held a payment of all the tonnage royalties for such quarter, and if the amount of such tonnage royalties for any quarter exceeds the minimum rental to be paid for such quarter, then only such excess shall be paid in addition to the payment of the minimum rental for such quarter. Whenever in any year the tonnage royalty on coal mined in any quarter thereof is less than the minimum rental for such quarter, and in any other quarter of the same year the tonnage royalty on coal mined is in excess of the minimum rental for such quarter, the shortage of one quarter shall be applied as a credit or offset against the excess of another quarter, so that if the tonnage royalties on all the coal mined during the year do not exceed the minimum annual rental for said year, the accounts for the different quarters shall be so adjusted that the Lessees will not have to pay more than the mini-

minimum annual rental for such year; but nothing herein contained shall be construed to give the Lessees the right to pay less in any year than the minimum annual rental for such year, or to pay less in any year than the equivalent of the tonnage royalties for all coal mined in such year, or to apply the tonnage royalties paid in one year as a credit on any of the minimum annual rental to be paid for any succeeding year or quarter thereof. But if the Lessees

shall fail in any year to mine a sufficient number of tons of
 112 coal to make the tonnage royalty thereon equal the minimum annual rental for such year, then the Lessees may, in the next succeeding two years, but not afterwards, and upon paying the minimum annual rental, mine free of said tonnage royalties a sufficient number of tons of coal to make up such deficiency without any charge for interest, provided always that nothing herein contained shall effect or reduce the amount of minimum annual rental to be paid by the Lessees for each quarter of each year as hereinbefore provided.

But if in any year the Lessees shall not be able to mine coal from the demised premises for a continuous period of not less than thirty (30) days because of a general strike among the miners in the section where operations of the Lessees or their Contractor are being conducted, or because of floods or other acts of God or of the public enemy, then, in any such case, the Lessees shall be released from the payment of any equitable proportion of the minimum annual rental, provided always that the period or periods of time in any one year to which such equitable release applies shall not exceed in all a total of four months, and that the minimum annual rental be not reduced below Ten Thousand (\$10,000) Dollars.

SECTION 8. The Lessees shall pay all taxes and assessments that may be levied or assessed against the lands herein described in whosever's name charged and assessed, and if any such taxes and assessments are paid by the Lessors, the Lessees shall repay to the Lessors the amount thereof, such amount to be recovered, in default of payment, under Section 14 of this Indenture; provided, however, that in case any of the rights and privileges hereinbefore excepted and reserved shall be let and leased to another lessee or lessees, except to tenants for the purpose of owning and farming the surface, then the amount of the taxes to be paid by the Lessees
 hereunder shall be in proportion to the extent of the rights
 113 and privileges of the Lessees hereunder as compared with the rights and privileges of such other lessee or lessees.

SECTION 9. The Lessees shall, on or before the fifteenth day of, each month, furnish or cause to be furnished to the Lessors a report showing the quantity of coal mined and shipped from or used on said premises by the Lessees, or by the Contractor for the

account of the Lessees, during the calendar month immediately preceding, giving the car numbers and weights furnished by the Norfolk & Western Railway for all such coal which is shipped by rail, and if any of such coal is not shipped by rail the quantity thereof shall be ascertained in a manner satisfactory to the Lessors.

Lessees will, as and when so requested in writing by Lessors, authorize and request said Railway Company, or any other common carrier engaged in the carrying from said leased premises of coal mined for or on account of the Lessees under this lease, to exhibit to Lessors, their agents and attorneys, any books and records showing the detail weight and quantity of coal shipped from said premises, or other pertinent information relating thereto, whenever demanded during business hours.

Lessees will render to the Lessors all other reasonable assistance and cooperation in the actual ascertainment and report of the quantity of coal mined hereunder, and of the royalties due thereon.

SECTION 10. The Lessees shall keep, or cause to be kept, books of account of mining, using, and shipping of coal mined hereunder, and said books shall be open at all reasonable times for inspection of the Lessors, their agents or attorneys, or other persons in their behalf, for the purpose of comparing and verifying the reports rendered by the Lessees under Section 9 hereof, or for obtaining information as to the mining, using, and shipping of said coal during any period.

114 **SECTION 11.** Except as and to the extent otherwise provided in Section 18 hereof, and except as and to the extent of the right and privilege hereinbefore granted the lessees of contracting with an independent contractor, the Lessees shall not convey, transfer, assign, or set over any of their estate, rights, title, or interest hereunder, or any part thereof, without the consent in writing of the Lessors being first had and obtained. Any conveyance, assignment, or transfer of such rights, title, or interest under or by virtue of the provisions of said Section 18 and any sale or disposition or possession thereof by or under the judgment, decree, or order of any court, or by or through any judicial proceedings, at law or in equity, shall be subject and subordinate to the rights and remedies of the Lessors under or by virtue of this lease, including the lien provided in this lease to secure the payment of all rents and royalties and other sums of money.

SECTION 12. The Lessors, their agents, engineers, or other persons in their behalf, shall at all reasonable times have the right and privilege of entering the said mine in, upon, or beneath the surface of the land herein described, in order to inspect, examine, survey, or measure the same, or any part thereof, or for any

lawful purpose, and for these purposes to use freely the means of access to the said mine, without hindrance or molestation.

SECTION 13. Lessors make no covenant of title with respect to the above demised premises further than this, that is to say, Lessors will at their own cost and expense defend all suits or actions that may be instituted against the Lessees or the Contractor by third parties affecting the title to the premises, rights, and privileges hereby leased and let, and the Lessors will indemnify and save harmless the Lessees against any and all judgments (including court costs and statutory attorneys' fees)

115 that may be procured against the Lessees or the Contractor in any such suit or action; provided always, moreover, that if the Lessees should be dispossessed by a third party or parties of any part or parts of the demised premises and the Lessees thereby be prevented from the practical and economical extracting, mining, and removal of the minimum of 15,000 tons of 2,000 pounds of coal per month which the Lessees agree to direct the Contractor to mine, produce, and load for their account during the twelve months beginning July 1, 1934, and for each year after June 30, 1935, of any extension or renewal of this lease, the Lessees shall have the right, upon the payment of all rents and royalties accruing or due to the date such dispossession occurs, to terminate this Indenture of Lease and to be no further bound by any of its terms and provisions.

SECTION 14. All payments herein provided to be made by the Lessees for or on account of taxes or assessments on said land shall be paid on or before the respective due dates of such taxes and assessments and upon verified statements thereof to be sensibly rendered by the Lessors to the Lessees. All royalties and rentals herein agreed to be paid by the Lessees shall be due and payable 60% thereof to the United Thacker Coal Company, P. O. Box 301, Huntington, West Virginia, and 40% to the Trustees, Transportation Bldg., Cincinnati, Ohio, or as may hereafter be directed and requested in writing by the Lessors, on the respective dates hereinbefore stipulated, and said rents and royalties, and said payments due by the Lessees for such taxes and assessments, shall be deemed and treated as rents reserved upon contract by the Lessors; and all remedies now or hereafter given by the Laws of West Virginia to landlords for the collection of rents shall exist in favor of the Lessors for the collection of the same, and if any of said royalties, rents, or payments shall remain unpaid for thirty (30) days after the same become due and payable as hereinbefore provided, the Lessors shall have the right to enforce the payment of the

116 same by the remedies given by law to landlords against delinquent tenants for nonpayment of rent; and a lien is

hereby expressly reserved, created, given, and imposed upon the leasehold estate hereby granted and upon all the rights and privileges hereby conferred upon the Lessees, to secure the payment of all of said royalties, rentals, and other payments required to be paid by the Lessees under the terms of this lease.

The Lessors shall also have the right of reentry by reason of any royalty, rental, or other payment being in arrears, or by reason of any breach of any of the terms, conditions, covenants, stipulations, or agreements herein contained, in the same manner and with the same effect as is provided in Section 15 hereof, or is now, or hereafter may be, provided under the laws of the State of West Virginia.

All of the provisions herein contained for the collection of royalties, rentals, or other payments shall be deemed cumulative and not exclusive, and shall not deprive the Lessors of any of their other legal or equitable remedies.

SECTION 15. All of the preceding terms, conditions, covenants, stipulations, and agreements to be performed and observed by the Lessees, and the covenant of the Lessees to perform and observe the same, shall inure to the benefit of the Lessors, and the Lessors may, by proper action at law or suit in equity, reentry, distress, or other proper proceeding, enforce any and all of said terms, conditions, covenants, stipulations, and agreements and the covenant of the Lessees to perform and observe the same. In the event the Lessees shall fail to pay any rents, royalties, or taxes when and as the same shall become due and payable, and such failure shall continue for a period of thirty (30) days, or in case the Lessees shall fail in the performance or observance of any of the other of said terms, conditions, covenants, stipulations,

and agreements, and any such failure as to any of such other terms, conditions, covenants, stipulations, and agreements shall continue for the period of sixty (60) days after the Lessors shall have given written notice of such default to the Lessees, or shall use the lands herein described contrary to the provisions or limitations hereof and such use shall continue for a period of sixty (60) days after the Lessor shall have given written notice thereof to the Lessees, then in either or any of said events, and as often as the same may occur, the Lessors shall have the right to forfeit and terminate this lease and the term created thereby and all of the rights and privileges of the Lessees under this lease, and reenter upon the demised premises by their agent or agents and the same again have, repossess and reenjoy as fully as if this lease had never been executed, but it shall not be necessary for the Lessors to make any such reentry or to make demand upon the Lessees in order to enforce any such forfeiture, or in

order to bring any action or suit to recover the demised premises; and a waiver by the Lessors of any particular cause of forfeiture shall not prevent the forfeiture and cancellation of this lease for any other cause of forfeiture or for the same cause occurring at any other time. The remedies given in this section are merely cumulative and shall not deprive the Lessors of any of their other legal or equitable remedies.

SECTION 16. In the event the indenture of lease (of the above mentioned improvements) hereinbefore referred to as having been executed simultaneously herewith between the Lessors and the Contractor, or any extension or renewal thereof, pursuant to the terms thereof and of this indenture, be terminated by the Lessors by reason of the breach or default thereof upon the part of the Contractor, the Lessees, provided they shall have paid to the Lessors all royalties, rentals, and taxes that shall then have accrued to the Lessors hereunder, may, if the Lessees so elect, terminate this lease upon the expiration of fifteen (15) days' 118 written notice to the Lessors of such election, and upon such termination of this lease the Lessees shall be absolved from any and all further obligations under this lease.

SECTION 17. This lease shall, at the option of the Lessees, be renewed and extended from year to year, not exceeding an aggregate period of four (4) years from and after June 30, 1935, upon and subject to the same terms, conditions, covenants, stipulations, and agreements herein contained, and subject to the payment of the same royalties, rentals, and other payments herein reserved and provided for; provided seventy-five (75) days' prior written notice of the intention of the Lessees to so renew or extend this lease shall be given by the Lessees to the Lessors.

SECTION 18. The provisions of this lease shall extend to and bind the Lessors, their successors, and assigns. Subject to any right to cancel or terminate this lease as provided herein or as given by law, the provisions of this lease, so far as they are applicable to the Lessees, shall be binding upon, and shall inure to the benefit of, the Lessees (as Receivers of Seaboard Air Line Railway Company, but not individually), and their successors, the Seaboard Air Line Railway Company, and its successors, the railroad corporation which may, after the termination of the receivership of Seaboard Air Line Railway Company, succeed the Receivers in the possession of substantially all the lines of railroad comprised in the receivership estate of Seaboard Air Line Railway Company, and the successors of such railroad corporation.

The receivership wherein the Receivers are receivers shall not be terminated, nor the receivership thereunder surrendered by the

Receivers or their successors, unless as a condition of such termination or surrender all the obligations of the Receivers then existing or to accrue under this lease shall be assumed by Seaboard Air Line Railway Company or other corporation that shall succeed the Receivers in the possession of substantially all of the lines of railroad comprised in the receivership estate. In case of a sale or conveyance of substantially all of said lines of railroad the purchaser or transferee of the purchaser shall not be at liberty to refuse to accept this lease, or to disaffirm it, but if acquiring substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose of reorganization, any such purchaser shall not incur any personal liability on or in respect of this lease, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume all the obligations of the Receivers under this lease existing at the time of such sale or thereafter to accrue hereunder. In case any corporation prior to the expiration of the term or period of this lease, or of any extension or renewal thereof, shall succeed the Receivers in the possession and operation of substantially all of said lines of railroad (whether Seaboard Air Line Railway Company, or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all the obligations of the Receivers then existing and to accrue under this lease, the Receivers shall thereupon be relieved from all further liability under or in respect of this lease.

In the event of such termination or surrender, Seaboard Air Line Railway Company, or other corporation, as the case may be, acquiring said railroads, shall enter into a written covenant direct with the Lessors whereby Seaboard Air Line Railway Company or such other corporation shall assume all the obligations then existing and to accrue of the Receivers under this lease, and thereupon Seaboard Air Line Railway Company, or such other corporation, shall be substituted for the Receivers under this lease with the same effect as if named herein as lessee hereunder.

120 SECTION 19. The giving of any notice to or the making of any demand on the Lessees under the provisions hereof shall, in addition to any other legal way of serving the same, be sufficient, unless and until written notice to the contrary is given by the Lessees to the Lessors, if addressed in writing and dispatched to the Lessees at Norfolk, Virginia, by registered mail; and the giving of any notice to or the making of any demand on the Lessors under the provisions hereof shall, in addition to any other legal way of serving the same, be sufficient, unless and until written notice to the contrary is given by the Lessors to the

Lessees, if addressed in writing and dispatched to the Lessors, care United Thacker Coal Company, P. O. Box 301, Huntington, West Virginia, by registered mail.

121 In witness whereof, the said United Thacker Coal Company, one of the parties of the first part, has hereunto caused its corporate name to be signed and its corporate seal to be affixed hereto, by its Vice President, hereunto duly authorized, attested by its Treasurer; the said H. Langdon Laws, Albert H. Cole, and Charles W. Campbell, Trustees, as aforesaid, the further parties of the first part, have hereunto affixed their signatures and seals; and the said Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, parties of the second part, have hereunto affixed their signatures and seals; all of the day and year first above written, the same being executed in triplicate.

UNITED THACKER COAL COMPANY.

By (s) BUFORD C. TYNES,

Its Vice President.

(s) H. LANGDON LAWS, *Trustee.* [SEAL]

(s) ALBERT H. COLE, *Trustee.* [SEAL]

(s) CHARLES W. CAMPBELL, *Trustee.* [SEAL]

(s) LEGH R. POWELL, JR., [SEAL]

(s) HENRY W. ANDERSON. [SEAL]

As Receivers of Seaboard Air Line Railway Company.

Attest:

(s) PHARENA PALMER,

Its Treasurer.

122 STATE OF WEST VIRGINIA,

County of Cabell, to wit:

I, Houston Laird, a Notary Public of said County of Cabell, do certify that Buford C. Tynes personally appeared before me in my said county, and, being by me duly sworn, did depose and say that he is the Vice President of the United Thacker Coal Company, the corporation described in the writing hereto annexed, bearing date the 1st day of May 1934, authorized by said Corporation to execute and acknowledge deeds and other writings of said Corporation, and that the seal affixed to said writing is the corporate of said Corporation, and that said writing was signed and sealed by him in behalf of said Corporation, by its authority duly given, and the said Buford C. Tynes acknowledged the said writing to be the act and deed of said Corporation.

Given under my hand and official seal this 13th day of July 1934.

My commission expires June 5, 1943.

(s) HOUSTON LAIRD,

Notary Public.

STATE OF OHIO.

County of Hamilton, to wit:

I, Charles H. Stephens, Jr., a Notary Public of said County of Hamilton, do hereby certify that Charles W. Campbell, Trustee, H. Langdon Laws, Trustee, and Albert H. Cole, Trustee, whose names are signed to the writing above and hereto attached, bearing date the 1st day of May 1934, have, each of them, this day acknowledged the same before me in my said county.

Given under my hand and official seal this 14th day of July 1934.

My commission expires on the 27th day of July 1935.

(s) CHARLES H. STEPHENS, JR.,

Notary Public.

STATE OF VIRGINIA,

City of Norfolk, to wit:

I, G. R. Garrison, a Notary Public of said City of Norfolk, do hereby certify that Legh R. Powell, Jr., Receiver, whose
123 name is signed to the writing above and hereto attached, bearing date the 1st day of May 1934, has this day acknowledged the same before me in my said city.

Given under my hand and official seal this 23rd day of July 1934.

My commission expires on the 14th day of March 1936.

(s) G. R. GARRISON,

Notary Public.

STATE OF VIRGINIA,

City of Norfolk, to wit:

I, G. R. Garrison, a Notary Public of said City of Norfolk, do hereby certify that Henry W. Anderson, Receiver, whose name is signed to the writing above and hereto attached, bearing date the 1st day of May 1934, has this day acknowledged the same before me in my said city.

Given under my hand and official seal this 23rd day of July 1934.

My commission expires on the 14th day of March 1936.

(s) G. R. GARRISON,

Notary Public.

124 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782, dated May 1, 1934, as executed between United Thacker Coal Company, H. Langdon Laws, Albert H. Cole, and Charles W. Campbell, Trustees, and Legh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, an original counterpart of which

agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.

125 *Comptroller's Contract No. 24363-A*

NORFOLK, VA., April 28, 1937.
CHILTON BLOCK COAL COMPANY,
Charleston, W. Va.

GENTLEMEN: Referring to the existing agreement under which you have (with the consent and agreement of Dingess-Rum Coal Company, your former lessor) assigned and transferred to the undersigned the right to take coal from the premises and properties a Logan County, West Virginia, known as Chilton Block Coal Company No. 1 mine properties.

The undersigned hereby offer to extend and renew said agreement of assignment and transfer for the period beginning on September 1, 1937, and ending on August 31, 1938, with the right in the undersigned, at their option, to further renew and extend said agreement from year to year, on and after August 31, 1938, not exceeding an aggregate period of two (2) years thereafter, upon seventy-five (75) days' previous written notice to you by the undersigned of their intention to renew and extend said agreement beyond August 31, 1938; such extension and renewal to and inclusive of August 31, 1938, and any such extensions or renewals thereafter, herein provided for, to be upon the same terms and conditions as are contained in said existing agreement with you, with the following further modifications thereof:

1. The undersigned to have the right, and to be obligated, on and after September 1, 1937, and during the said period ending on August 31, 1938, or during the period of any extension or renewal thereof herein provided for, to extract, mine, and remove, or cause to be extracted, mined, and removed, from said premises and properties, for use by the undersigned, not less than 6,876 tons of coal per month, and the further right, at the election of the un-

dersigned, to extract, mine, and remove, or cause to be extracted, mined, and removed, therefrom, for their own use, such additional tonnage of coal as the undersigned shall elect to extract, mine, and remove, or cause to be extracted, mined, and removed, from said premises and properties.

2. In case the existing agreement of the undersigned with Daniel H. Pritchard, as Contractor (as such agreement has heretofore been further extended, renewed, and modified in and by letter-agreement dated April 28, 1937, between the undersigned and said Pritchard, as Contractor, and whereunder the said Contractor has agreed to perform certain work and service of extracting, mining, producing, transporting, and loading on railroad cars, the coal mined and produced from said mine properties) shall at any time be terminated by the undersigned in the exercise by the undersigned of their rights of termination thereof for any cause, then, in such event, the said agreement of assignment and transfer between you and the undersigned (as in and by this offer and your acceptance thereof further extended, renewed and modified) shall thereupon, and simultaneously therewith, stand terminated, and the undersigned shall be released and absolved from all further obligations or liabilities thereunder.

126 3. The foregoing offer of the undersigned is subject to and conditioned upon the execution and delivery to the undersigned of the written consent and agreement of Dingess-Rum Coal Company in and to the extension and renewal for the period, and upon the terms and conditions, hereinbefore set forth, of said agreement of assignment and transfer between you and the undersigned, such consent and agreement by said Dingess-Rum Coal Company to be also upon and subject to the terms and conditions stated in its letter dated July 13, 1935, to the undersigned.

If, as we understand, the foregoing offer of the undersigned is acceptable to you, will you please endorse your acceptance of such offer on the enclosed counterpart hereof, and return such counterpart so endorsed to the undersigned; such acceptance by you, or by your authorized representative in your behalf, to constitute the agreement of the undersigned with you in respect of the subject matters hereof.

Yours very truly,

LEGH R. POWELL, Jr., and
HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By (S) LEGH R. POWELL, JR.,

Receiver.

The foregoing offer of the Receivers of Seaboard Air Line Railway Company is hereby accepted by the undersigned this 28th day of April 1937.

CHILTON BLOCK COAL COMPANY,

By (S) T. B. HARVEY,

Its Vice President.

127 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363-Sup. dated April 28, 1937, as executed between Chilton Block Coal Company and Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

Custodian of Contracts for Receivers of Seaboard Air Line Railway Co.

128 *Comptroller's Contract No. 24363-A*

DINGESS-RUM COAL COMPANY,

Huntington, W. Va., June 30, 1936.

To MESSRS. LEIGH R. POWELL, JR., and HENRY W. ANDERSON,
as Receivers of Seaboard Air Line Railway Company, Norfolk, Va.

GENTLEMEN: The undersigned, Dingess-Rum Coal Company, hereby consents and agrees to the extension and renewal, for the period, with the right of renewal at your option, and upon and subject to the other conditions, terms, and provisions set forth in the annexed copy of your letter-offer to Chilton Block Coal Company, dated June 30, 1936, of the existing assignment and transfer to you by said Chilton Block Coal Company of the right and privilege to take from the premises and properties in Logan County, West Virginia, known as the Chilton Block Coal Company No. 1 mine properties, the quantity of coal referred to in said letter-offer, such consent and agreement of the undersigned being also upon and subject to the terms and conditions stated in letter of the undersigned to you dated July 13, 1935, as said last mentioned terms and conditions are modified by

letter of the undersigned to you dated June 23, 1936; said consent and agreement of the undersigned to be effective as and when your said offer is accepted by said Chilton Block Coal Company.

Yours very truly,

DINGESS-RUM COAL COMPANY,

By (s) ROLLA D. CAMPBELL,

Its President.

RDC:MSH.

129 I hereby certify that the foregoing is a true and correct copy of letter dated June 30, 1936, from Dingess-Rum Coal Company to L. R. Powell, Jr., and Henry W. Anderson, Receivers of S. A. L. Railway Company, the original of which letter was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original letter is one of the permanent records of the Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

Custodian of Contracts for Receivers of Seaboard Air Line Railway Company.

130 *Comptroller's Contract No. 24363-A*

NORFOLK, VA., June 30, 1936.

TO CHILTON BLOCK COAL COMPANY,

Charleston, W. Va.

GENTLEMEN: Referring to the existing agreement under which you have (with the consent and agreement of Dingess-Rum Coal Company, your former lessor) assigned and transferred to the undersigned the right to take coal from the premises and properties in Logan County, West Virginia, known as Chilton Block Coal Company No. 1 mine properties.

The undersigned hereby offer to extend and renew said agreement of assignment and transfer for the period beginning on July 1, 1936, and ending on August 31, 1937, with the right in the undersigned, at their option, to further renew and extend said agreement from year to year, on and after August 31, 1937, not exceeding an aggregate period of three (3) years thereafter, upon seventy-five (75) days' previous written notice to you by the undersigned of their intention to renew and extend said

agreement beyond August 31, 1937; such extension and renewal to and inclusive of August 31, 1937, and any such extensions or renewals thereafter, herein provided for, to be upon the same terms and conditions as are contained in said existing agreement with you, with the following modifications thereof:

1. The undersigned to have the right, and to be obligated, on and after July 1, 1936, and during the said period ending on August 31, 1937, or during the period of any extension or renewal thereof herein provided for, to extract, mine, and remove, or cause to be extracted, mined, and removed from said premises and properties, for use by the undersigned, not less than 5,938 tons of coal per month, and the further right, at the election of the undersigned, to extract, mine, and remove, or cause or permit to be extracted, mined, and removed therefrom, for their own use, or for such other use or disposition, as the undersigned shall determine, such additional tonnage of coal as the undersigned shall elect to extract, mine, and remove, or cause or permit to be extracted, mined, and removed from said premises and properties.

2. In case the existing agreement of the undersigned with Daniel H. Pritchard, as Contractor (as such agreement has heretofore been extended, renewed, and modified in and by letter-agreement dated June 30, 1936, between the undersigned and said Pritchard, as Contractor, and whereunder the said Contractor has agreed to perform certain work and service of extracting, mining, producing, transporting, and loading on railroad cars, certain of the coal mined and produced from said mine properties) shall at any time be terminated by the undersigned in the exercise by the undersigned of their rights of termination thereof for any cause, then, in such event, the said agreement of assignment and transfer between you and the undersigned (as in and by this offer and your acceptance thereof extended, renewed, and modified) shall thereupon, and simultaneously therewith, stand terminated, and the undersigned shall be released and absolved from all further obligations or liabilities thereunder.

3. The foregoing offer of the undersigned is subject to and conditioned upon the execution and delivery to the undersigned of the written consent and agreement of Dingess-Rum Coal Company in and to the extension and renewal for the period, and upon the terms and conditions, hereinbefore set forth, of said agreement of assignment and transfer between you and the undersigned, such consent and agreement by said Dingess-Rum Coal Company to be also upon and subject to the terms and conditions stated in its letter dated July 13, 1935, to the undersigned, and as said last-mentioned terms and conditions are modified by its letter dated June 23, 1936, to the undersigned.

If, as we understand, the foregoing offer of the undersigned is acceptable to you, will you please endorse your acceptance of such offer on the enclosed counterpart hereof, and return such counterpart so endorsed to the undersigned; such acceptance by you, or by your authorized representative in your behalf, to constitute the agreement of the undersigned with you in respect of the subject matters hereof.

Yours very truly,

(s) LEGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

The foregoing offer of the Receivers of Seaboard Air Line Railway Company is hereby accepted by the undersigned this 30th day of June 1936.

CHILTON BLOCK COAL COMPANY,

By (s) T. B. HARVEY,

Its Vice President.

I hereby certify that the foregoing is a true and correct copy of agreement No. 24363-Sup. dated June 30, 1936, as executed between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company and Chilton Block Coal Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,

Custodian of Contracts for Receivers of Seaboard Air Line Railway Co.

134

Comptroller's Contract No. 24363-A

DINGESS-RUM COAL COMPANY,

Huntington, W. Va., July 13, 1935.

To Messrs. LEGH R. POWELL, JR., and HENRY W. ANDERSON, as Receivers of Seaboard Air Line Railway Company, Care, Mr. J. L. Brown, their Purchasing Agent, Norfolk, Virginia.

Referring to the offer dated July 5, 1935, of Chilton Block Coal Company to grant or cause to be granted to you, upon and subject to the terms and conditions stated in said offer, the following:

(a) The valid and effectual right and privilege to take from the premises in Logan County, West Virginia, known as the Chilton Block Coal Company No. 1 Mine properties, during the period stated in the offer to you dated July 5, 1935, of Daniel H. Pritchard, or any extension or renewal of said period, the quantity of coal which said Pritchard offers in and by his said offer to extract, mine, manufacture, and load on railroad cars for you; and

(b) To grant to said Pritchard, simultaneously and for a period coextensive with the aforesaid grant by Chilton Block Coal Company to you, the right to employ and use in the performance by said Pritchard of the work and service contemplated in his said offer to you, all buildings, tipples, and other structures, and all equipment, machinery, appliances, and appurtenances on said premises, owned or leased by said Chilton Block Coal Company and necessary and convenient in the performance by said Pritchard of said work and service.

The undersigned, as the owner of, and the lessor to, said Chilton Block Coal Company, of the said Mine properties mentioned in paragraphs (a) and (b), hereby agrees in the event of your

135 acceptance of said offer of Chilton Block Coal Company, simultaneously with the execution and delivery to you of the instrument of conveyance, assignment, and transfer in said offer of said Chilton Block Coal Company provided for, to execute and deliver to you the written consent and agreement of the undersigned to such conveyance, assignment, and transfer to you, and to the payment by you, in the absence of demand from us, to or upon the order of said Chilton Block Coal Company, and in the event of demand from us, to us, of the rent or royalty of 10c per ton to be provided in said instrument of conveyance, assignment, and transfer to be paid by you, and which shall constitute the entire consideration to be paid by you for such conveyance, assignment, and transfer. The right so conveyed, assigned, and transferred to you by the Chilton Block Coal Company shall be subject to the general terms and provisions of our lease to said Chilton Block Coal Company, and said instrument of consent shall specifically prohibit the conveyance or transfer, either in whole or in part, by you of any rights so conveyed, assigned, or transferred by the Chilton Block Coal Company without our prior consent in writing; but such prohibition shall not apply to the Seaboard Air Line Railway Company if the receivership proceeding is dismissed, or to any succes- or corporation thereof operating the said railway or a substantial portion thereof. Said written consents and agreements of the undersigned shall contain such other terms and provisions applicable to the payment to the Chilton Block

Coal Company of such rent or royalty as shall be approved by your counsel and by our counsel.

Yours truly,

DINGESS-RUM COAL COMPANY,
By (s) ROLLA D. CAMPBELL,
Vice President.

RDC:MSH.

136 I hereby certify that the foregoing is a true and correct copy of letter dated July 13, 1935, from Dingess-Rum Coal Company, L. R. Powell, Jr., and Henry W. Anderson, Receivers of S. A. L. Railway Company, the original of which letter was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original letter is one of the permanent records of the Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
*Custodian of Contracts for Receivers of
Seaboard Air Line Railway Company.*

137 *Comptroller's Contract No. 24363-A*

JULY 5, 1935.

To: MESSRS. LEGH R. POWELL, JR., and HENRY W. ANDERSON
*as Receivers of Seaboard Air Line Railway Company,
Care Mr. J. L. Brown, their Purchasing Agent, Norfolk,
Virginia.*

The undersigned, Chilton Block Coal Company, the present lessee of the premises in Logan County, West Virginia, known as the Chilton Block Coal Company No. 1 Mine properties, hereby submits to you the following offer of the undersigned, subject to your acceptance in the event of your acceptance of the offer to you dated July 5, 1935, of Daniel H. Pritchard, of Charleston, W. Va., a copy of which offer by him is attached to this offer, to wit:

(1) To grant, or cause to be granted, to you (a) the valid and effectual right and privilege to take from said mine during the period stated in said offer of said Daniel H. Pritchard, or any extension or renewal therein mentioned, the quantity of coal which said Pritchard offers in and by his said offer to extract, mine, manufacture, transport, and load on railroad cars for you,

and (b) to grant to said Pritchard, simultaneously and for a period coextensive with the aforesaid grant to you, the right to employ and use in the performance by said Pritchard of the work and service contemplated in his said offer to you, all buildings, tipples, and other structures, and all equipment, machinery, appliances, and appurtenances on said premises owned or leased by the undersigned and necessary and convenient for the performance by said Pritchard of said work and service.

(2) You to pay to or upon the order of the undersigned for the rights and privileges which the undersigned herein offers to grant, or cause to be granted, to you, a rent or royalty of Ten Cents (10c) per ton of 2,000 pounds of said coal so mined,
 138 manufactured, transported, and shipped by said Pritchard for you, in the event of your acceptance of his said offer, said rent or royalty payment to constitute the entire consideration to be paid by you for said rights and privileges.

(3) The undersigned to execute and deliver to you appropriate instrument of conveyance, assignment, and transfer to you of the right and privilege referred to in subdivision (a) of paragraph 1 of this offer, in form approved by your counsel, and conformable to the terms and provisions of this offer, such instrument to contain, and as applicable and relating to the rights and privileges referred to in paragraph 1 hereof, the same terms, provisions, and conditions as are contained in the existing Indenture of Lease dated May 1, 1934 (as now extended and renewed) between United Thacker Coal Company and the Cole & Crane Real Estate Trust Trustees, whereunder you have, among other things, acquired the right and privilege of extracting and mining coal for your own use from the veins or seams of coal in, upon, and under the tracts of land therein mentioned and described and known as the "William-Ann" mine properties, in Mingo County, West Virginia; provided, however, that you are not to pay any taxes, levies, or assessments against the lands comprised within said mine properties, or any interest in such lands, and provided, further, that in all cases where the terms, provisions, and conditions of said Indenture of Lease dated May 1, 1934, conflict with or are inconsistent with the terms and provisions of this offer, the terms and provisions of this offer shall, in said conveyance, assignment, and transfer to you, govern and control.

(4) Said instrument of conveyance, assignment, and transfer to you to also provide for termination thereof by you simultaneously with your termination of your agreement with said Pritchard for said work and service to be performed by him as and when your said agreement with him is terminated by you in the exer-

cise by you of any right of termination thereof by you for which your said agreement with Pritchard shall provide.

The undersigned, simultaneously with the execution and
139 delivery to you of the instrument of conveyance, assignment, and transfer provided for in paragraph 3 hereof, will cause to be executed and delivered to you the written consent and agreement of the owners, and present lessors to the undersigned, of said mine properties, to the said conveyance, assignment, and transfer by the undersigned to you, and to the payment by you to or upon the order of the undersigned, of the rent or royalty, or the minimum rent or royalty, referred to in paragraph 2 hereof; said written consent and agreement to be in such form, and to contain such terms and provisions applicable to the payment to the undersigned of such rent or royalty, or minimum rent or royalty, as shall be approved by your counsel.

In the event of your acceptance of the foregoing offer, upon and subject to the above-stated terms, conditions, and provisions, please endorse on the enclosed counterpart of this offer such acceptance by you, or in your behalf, and return such counterpart, so endorsed, to the undersigned.

CHILTON BLOCK COAL COMPANY,

By (s) DANIEL H. PRITCHARD,

Its President.

The undersigned, as Receivers of Seaboard Air Line Railway Company, hereby on this 9th day of July 1935, accept the foregoing offer, upon and subject to the terms, provisions, and conditions therein set forth, subject to approval or ratification by the court of primary jurisdiction of the receivership court of Seaboard Air Line Railway Company.

(s) LEGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

140 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363 dated July 5, 1935, as executed between Chilton Block Coal Company and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart

is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
*Custodian of Contracts for Receivers of
Seaboard Air Line Railway Co.*

141 *Comptroller's Contract No. 23781-B*

VIRGINIA:

Circuit Court of Wise County on Monday the 2nd day of August in the year of our Lord Nineteen Hundred Thirty-seven.
Present: The Honorable H. A. W. Skeen, Judge.

GLAMORGAN COAL LAND CORPORATION, COMPLAINANT

VS.

GLAMORGAN COALS, INCORPORATED, LEGH B. POWELL, JR., and
HENRY W. ANDERSON, RECEIVERS OF SEABOARD AIR LINE RAIL-
WAY COMPANY, PAUL J. KENT, RECEIVER OF CHATTANOOGA NA-
TIONAL BANK AND SHENANDOAH LIFE INSURANCE COMPANY.
DEFENDANTS

DECREE

This cause came on again this day to be heard on the papers formerly read herein and on the motion of A. E. Stone and Walter C. Shunk, Receivers herein, for an order of this Court ratifying, confirming, and approving the action of said Receivers herein in carrying out and performing a certain agreement dated July 10, 1934, between the Receivers of Seaboard Air Line Railway Company and Glamorgan Coals, Incorporated, one of the defendants herein, as said agreement had been from time to time modified and amended, extended, and supplemented, by the parties in interest since the appointment on January 10, 1937, of said A. E. Stone as Sole Receiver of Glamorgan Coals, Incorporated, and since the appointment on February 12, 1937, of said Walter C. Shunk as Coreceiver, and authorizing, directing, and empowering said receivers to continue to carry out and perform the

142 terms and conditions of said contract of July 10, 1934, extended, modified, supplemented, and amended as aforesaid until further order of this Court, or until such time as said receivers may be discharged from their duties as such Receivers; and counsel having been heard, and the Court being of the opinion that it would be to the best interest of all concerned that said action of the Receivers herein be ratified, authorized, and approved by the Court, and that said Receivers be authorized, directed, and empowered to continue to carry out and perform the

terms and conditions of said contract of July 10, 1934, as extended, modified, supplemented, and amended by the parties in interest until further order of this Court, or until such Receivers are relieved of their duties as such, it is accordingly ordered, adjudged, and decreed as follows:

1. That the action of the Receivers herein, both during the time that the said A. E. Stone was acting as Sole Receiver, and after the said Walter C. Shunk was appointed Coreceiver, in carrying out and performing the terms and conditions of said agreement dated July 10, 1934, as extended, modified, supplemented, and amended in the form and containing the provisions of copy thereof marked "Exhibit A" attached as a part of this decree with the Receivers of Seaboard Air Line Railway Company and in adopting and affirming all the terms, provisions, and conditions in force and effect as of April 22, 1937, of said agreement dated July 10, 1934, between the Receivers of Seaboard Air Line Railway Company and Glamorgan Coals, Incorporated, one of the defendants herein, and said action by the Receivers herein is hereby in all respects authorized, ratified, and approved.

143 2. That the said Receivers herein are hereby authorized, directed, and empowered to continue to operate under and to carry out and perform the terms, provisions, and conditions of said agreement dated January 10, 1934, as extended, modified, supplemented, and amended in force and effect as of April 22, 1937, until further order of this Court, or until said receivership is wound up and said Receivers discharged.

3. That the Receivers herein are further authorized, directed, and empowered to carry out and perform all the terms, provisions, and conditions on the part of the Receivers herein to be carried out and performed, of said agreement dated July 10, 1934, as said terms, provisions, and conditions thereof are set forth on Exhibit A attached as a part of this decree: provided, however, that no successor, purchaser, or new operating company shall assume any indebtedness or liabilities of Glamorgan Coals, Incorporated, one of the defendants herein.

And this cause is continued.

144 [Exhibit A omitted. Printed side page. 59 ante.]

154 [Exhibit B omitted. Printed side page. 69 ante.]

155 [Exhibit C omitted. Printed side page. 70 ante.]

156 VIRGINIA.

County of Wise to wit:

I, H. I. Sullivan, a deputy for E. B. McElroy, Clerk of the Circuit Court for Wise County, Virginia, hereby certify that the foregoing writing is a true copy of a decree as same appears of

record in Wist County Chancery Order Book #27 at page #153, etc.

Given under my hand and the seal of the Circuit Court of Wise County, Virginia, this the 18th day of August 1937.

(s) H. I. SULLIVAN,

Deputy Clerk, Circuit Court, Wise County, Virginia.

157

Comptroller's Contract No. 2378-B

This Supplemental Agreement, made this 1st day of April 1935, between Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"), parties of the first part, and Glamorgan Coals, Incorporated, a corporation under the laws of Virginia (hereinafter called "Contractor"), party of the second part;

Whereas, the parties hereto have heretofore made and entered into that certain written agreement dated the 16th day of July 1934, whereunder the Contractor has agreed to do and perform for the Receivers, and as an independent contractor, the work and service of extracting, mining, manufacturing, and transporting from the mine and loading on cars at the mine tippie for shipment to or for account of the Receivers, of coal in, upon, or under those certain tracts or parcels of coal lands, coal rights, and surface rights situated near the Town of Wise, Wise County, Virginia, in said agreement mentioned and described, and leased to said Receivers in and by that certain Deed of Lease dated July 12, 1934 from Glamorgan Coal Land Corporation to the Receivers; and

Whereas, it has become necessary for the Contractor, in order to continue to carry out and perform its obligations to the Receivers under and by virtue of said agreement dated July 10, 1934, to borrow certain moneys to be applied by the Contractor as hereinafter set forth; and

Whereas, the Contractor has represented to the Receivers that in securing said loan it will be necessary for the Contractor to agree with the Receivers to supplement, modify, and amend certain of the provisions of said agreement dated July 10, 1934, and the Receivers and the Contractor desire to agree in regard to such matters and in certain other respects, as hereinafter set forth.

Now, therefore, in consideration of the premises, of the sum of One Dollar (\$1.00) paid by the Receivers and the Contractor each to the other, and in further consideration of the mutual
158 benefits and of the covenants and agreements hereinafter contained, the Receivers and the Contractor do hereby covenant and agree as follows:

1. That said agreement dated July 10, 1934, is hereby, by mutual consent and agreement of the Receivers and the Contractor, renewed and extended for the period of three (3) years from and after July 17, 1935, upon the same terms and conditions as are therein contained, except as and to the extent said terms and conditions are in and by this Supplemental Agreement expressly supplemented, modified, or amended.

2. That during the period beginning on July 1, 1935, and ending on July 17, 1938, during which said agreement dated July 10, 1934, as supplemented, modified, or amended in and by this agreement, shall continue in force, the aggregate minimum yearly tonnage of coal to which said agreement, as so supplemented, modified, or amended, shall relate to and apply, shall not be less than 120,000 tons yearly in monthly quantities of not less than 10,000 tons, and the aggregate maximum yearly quantity shall be 240,000 tons in monthly quantities of 20,000 tons, as may be currently required by the Receivers. The Receivers will during said period direct the Contractor to mine, produce, and load not less than the above stated minimum monthly tonnage.

3. That subparagraph 7 (a) of said agreement dated July 10, 1934, is hereby supplemented, modified, and amended so as to provide that on and after July 1, 1935, and during the remainder of the term or period that said agreement, as in and by this agreement supplemented, modified, and amended, shall continue in force and effect, the Receivers will, instead and in lieu of the flat sum of \$1.55 per ton provided for in said subparagraph 7 (a), pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading of the coal, and in payment and reimbursement for all the other obligations, matters, and things which the Contractor under any of the provisions of said agreement, as so supplemented, modified, or amended,
 159 agrees to do and perform, a flat sum of \$1.42 (subject to adjustment as in said subparagraph 7 (a) of said agreement, and subject to reduction as in the last subparagraph of this paragraph 3, provided, and subject also to the provisions of paragraph 8 of this supplemental agreement) per ton of 2,000 pounds of such coal which is so mined, produced, and loaded on railroad cars by the Contractor, conforms to the specifications, marked "Exhibit A" and attached as a part of said agreement dated July 10, 1934, and passes the inspection of the Receivers; provided, however, that said flat sum payment of \$1.42 per ton shall be subject to adjustment upward or downward, depending upon the fluctuation of wages and unit prices over which the Contractor has no control, determined as in said subparagraph 1 (a) set forth, but based on wage scale, power, and compensation insurance rates in effect July

1, 1935, and material prices paid during the months of July, August, and September 1935.

It is further agreed that said modified base contract price of \$1.42 is based on the aggregate of—

(i). Actual cost per ton to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal on railroad cars, as in said agreement dated July 10, 1934, as supplemented, modified, or amended in and by this agreement, provided;

(ii) Contractor's compensation of 10¢ per ton.

It is further agreed that whenever the terms "flat sum," "base sum," "flat contract price" or "base contract price" per ton of \$1.55 are used in said subparagraph 7 (a) of said agreement dated July 10, 1934, or in any of the other provisions thereof, the same shall, on and after July 1, 1935, and during the term or period said agreement, as herein supplemented, modified, or amended, shall remain in effect, relate to, and mean the modified flat or base sum or flat or base contract price of \$1.42 per ton herein provided for.

160 It is further agreed that whenever, from time to time, and so long as, the flat or base sum or flat or base contract price currently payable by the Receivers to the Contractor under said agreement dated July 10, 1934, as herein supplemented, modified, or amended, plus the royalty charge currently payable by the Receivers under said Deed of Lease dated July 12, 1934, from Clamorgan Coal Land Corporation to the Receivers (as said Deed of Lease is in and by agreement of even date herewith supplemented, modified, and amended) upon coal mined and shipped by the Contractor for the Receivers under said agreement dated July 10, 1934, as in and by this agreement supplemented, modified, or amended, shall exceed the aggregate sum of \$1.50 per ton, then the Contractor's compensation of Ten Cents (10¢) per ton shall be reduced by an amount per ton equal to the amount per ton of such excess.

4. That on and after April 1, 1935, the provisions of paragraph numbered 8 of said agreement dated July 10, 1934, giving the Receivers the right to deduct from each monthly settlement with the Contractor thereunder the sum of Eight (8¢) Cents per ton out of the sum of Ten (10¢) Cents per ton payable by the Receivers to the Contractor under said agreement over and above the actual cost to the Contractor of extracting, mining, manufacturing, transporting, and loading on railroad cars the coal as in said agreement provided for, and to apply as in said paragraph 8 set forth the amount so deducted in payment of the principal and interest of the notes therein mentioned of the Contractor held by the Receivers, and the provisions of said paragraph numbered 8

obligating the Contractor to apply, as set forth therein, the remaining Two (2¢) Cents per ton of said Ten (10¢) Cents per ton to the payment of the lien indebtedness of the Contractor referred to in said paragraph numbered 8, shall cease to apply. The Receivers and the Contractor agree that on and after April 1, 1935, and during the remainder of the continuance of said agreement dated July 10, 1934, as herein supplemented, 161 modified, or amended, the following provisions shall be substituted and shall apply instead and in lieu of the provisions of said paragraph numbered 8:

The Contractor is, as of April 1, 1935, indebted to the Receivers in the aggregate principal amount of \$22,422.41, evidenced by promissory notes for said aggregate principal amount of the Contractor held by the Receivers, and which notes bear interest from the date thereof at the rate of 6% per annum. The Contractor is also indebted to certain other parties, as of April 1, 1935, in the aggregate principal sum of \$5,281.48, said last-mentioned debts being secured by certain liens on properties owned by the Contractor, and the payment of which was assumed by the Contractor in its purchase of said properties. The Contractor represents to the Receivers that it will, during the first three months after the date of this agreement, borrow from certain other parties the aggregate sum of \$2,400.00, of which \$600.00 will be so borrowed in April 1935, \$1,200.00 in May 1935, and \$600.00 in June 1935; that said loans to the Contractor will be evidenced by promissory notes of the Contractor to be delivered to the respective lenders of said \$2,400.00, bearing interest at the rate of 6% per annum from the date of such notes, payable at the maturity thereof, and that each of such notes will become due and payable upon the expiration of ten (10) months after the date thereof. The Contractor also represents to the Receivers that it may be necessary for it, subject to the written approval of the Receivers to be first obtained, to borrow from the same parties during the seven months beginning on July 1, 1935, an additional aggregate sum of \$2,600.00, or less, such additional sum, if so borrowed by the Contractor, to be evidenced by promissory notes of the Contractor to be delivered to the respective lenders, bearing 6% interest per annum from the date of such notes, payable at the maturity thereof, and each of such notes to mature upon the expiration of ten (10) months after the date thereof.

162 The Contractor agrees that the full proceeds of said loan to it of \$2,400.00 aggregate amount will be promptly applied by the Contractor for the following uses or purposes, or such other uses and purposes as the Receivers shall have previously approved in writing, and in order to reduce as much as

possible the cost to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal on railroad cars for shipment to or for account of the Receivers under said agreement dated July 10, 1934, as herein supplemented, modified, or amended, to wit:

(a) Repairs to mine cars, including lumber, but excluding labor---	\$700. 00
(b) To build up commissary inventory-----	400. 00
(c) To clean up its main haulage route so as to provide for economical use thereof-----	700. 00
(d) Installation of electric-light meters in dwellings owned by the Contractor and rented to its employees-----	600. 00

The Contractor agrees that in the event it shall, with the written approval of the Receivers to be first obtained, so borrow said additional sum of \$2,600,000, or any part thereof, the proceeds of said loan shall be used and applied by it for such purposes as the Receivers shall previously approve in writing, and in order to reduce as much as possible the cost to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal on railroad cars for shipment to or for account of the Receivers under said agreement dated July 10, 1934, as herein supplemented, modified, or amended.

The Receivers and the holders of said above-mentioned lien security debts aggregating \$5,281.46 principal amount have severally agreed with the Contractor to subordinate respectively the principal and interest of the said indebtedness of the Contractor to the Receivers and the principal and interest of the said lien
163 security indebtedness of the Contractor, to the indebtedness of the Contractor to the holders of said notes evidencing said \$2,400.00 loan to the Contractor and, in the event said additional loan of \$2,600.00 or less should be obtained by the Contractor, to the indebtedness of the Contractor to the holders of the notes evidencing such additional loan. The Contractor agrees that it will duly and punctually pay its said notes evidencing said loan of \$2,400.00 and its said notes evidencing said additional loan of \$2,600,000 or less, if obtained by it, and when the same respectively become due and payable, and all accrued interest thereon. The Contractor further agrees that after the payment in full of said notes and accrued interest thereon, the Contractor will apply all of the surplus net earnings and income of the Contractor from any and all sources derived, and after deducting the sum provided for in paragraph 5 of this agreement, as and when said sum is applied or held for application as in said paragraph 5 provided, to the payment ratably of the Contractor's said indebtedness to the Receivers and its indebtedness to its said lien creditors, in the respective proportions which the aggregate principal amount of said indebtedness to the Receivers and said lien

creditor indebtedness shall bear to the aggregate principal amount of said indebtedness of the Contractor; said surplus net earnings and income to be ascertained and so applied and paid at such stated times and for such period or periods as the Receivers shall from time to time approve and direct. The Receivers shall have the right at their option from time to time to deduct from settlements with the Contractor under said agreement dated July 10, 1934, as herein supplemented, modified, or amended, all such payments due by the Contractor to the Receivers under or by virtue of the provisions of this paragraph 4 hereof.

Anything in said agreement dated July 10, 1934, or in this agreement, to the contrary notwithstanding, and except as
164 and to the extent in this agreement otherwise expressly provided, in making payments in respect of coal extracted, mined, manufactured, transported, and loaded by the Contractor under said agreement, as supplemented, modified, or amended in and by this agreement, the Receivers shall have the right, at any and all times, to offset or deduct the amount of any and all claims and/or indebtedness of the Receivers against the Contractor, whether arising under this or any other contract or transaction.

5. That, in the event (a) said additional loan of \$2,600.00, or less, is not obtained by the Contractor, on and after March 1, 1936, or (b) in the event said additional loan is obtained by the Contractor, on and after the expiration of eleven (11) months after the date of the note or notes of the Contractor evidencing the last installment paid the Contractor on such additional loan, and during the remainder of the continuance of said agreement dated July 10, 1934, as herein supplemented, modified, or amended, for the purposes of said agreement, in ascertaining the surplus net earnings and income of the Contractor which is to be applied to the payment of the Contractor's said indebtedness to the Receivers and its indebtedness to the said lien creditors, as hereinbefore provided, there may be deducted from the gross earnings and income of the Contractor not exceeding the sum of \$3,000 per year, said sum to be used and applied by the Contractor, subject to the consent of the Receivers to be first obtained, for additions, improvements, or betterments to the plant, machinery, appliances, or other property of the Contractor, or for such other of its corporate purposes as the Receivers may previously approve.

6. That all the applicable terms, provisions, and conditions of said agreement dated July 10, 1934, except as and to the extent in and by this agreement supplemented, modified, or amended, shall, on and after April 1, 1935, and during the remain-
165 der of the continuance of said agreement, continue in force

and effect unaltered and unimpaired, and as relating and applicable to the matters and things to which said terms, provisions, and conditions under or by virtue of said agreement, as so supplemented, modified, or amended, respectively relate to and apply.

7. Anything in said agreement dated July 10, 1934, as herein supplemented, modified, or amended, to the contrary notwithstanding, it is expressly further agreed as follows:

(a) That if the Contractor shall, with the written approval of the Receivers to be first obtained, obtain said additional loan of \$2,600 or less, and shall fail during the seven months next succeeding the date on which the first installment on such additional loan is paid to the Contractor, to apply the full proceeds of such additional loan as hereinbefore provided, the Receivers shall have the right at their option, upon ten (10) days' prior written notice given by them to the Contractor of such intention, to terminate said agreement as herein supplemented, modified, or amended, and this agreement, and upon the giving of such notice said agreement and this agreement shall thereupon stand terminated.

(b) That if at any time after July 1, 1935, and during the remainder of the continuance of said agreement, as herein supplemented, modified, or amended, the Receivers shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to the Receivers at a total cost per ton to the Receivers of less than the amount per ton (i. e., actual cost plus 10¢ per ton) which the Receivers are at the time obligated to pay to the Contractor for its work and service under said agreement, as so supplemented, modified, or amended, plus the royalty charge of Eight (8¢) Cents per ton or of Ten (10¢) Cents per ton, as the case may be, at the time being paid by the Receivers for coal mined and shipped for them by the Contractor, the

Receivers shall have the right at their option, in such event
166 and from time to time as often as such event shall happen, upon ten (10) days' previous written notice given by them to the Contractor of such intentions, to terminate said agreement and this agreement, and same shall, upon such notice being given, thereupon stand terminated, unless the Contractor shall, before the expiration of said ten (10) days' notice, agree in writing with the Receivers to reduce the cost to the Receivers of such work and service by the Contractor to an amount equal to or less than such total cost to the Receivers to purchase such other coal.

(c) That if at any time after July 1, 1935, and during the remainder of the continuance of said agreement, as herein supplemented, modified, or amended, the Receivers shall, on account of

freight rate changes or changes in divisions of freight rates effective at any time after July 1, 1935 (which increase the cost to or charges against the Receivers for the transportation from the mine to the point of destination designated by the Receivers of the coal shipped to the Receivers under said agreement), discontinue the purchase of coal in this same coal field, the Receivers shall have the right at their option, in such event and from time to time, as often as such event shall happen, upon ten (10) days' previous written notice by them to the Contractor of such intention, to terminate this agreement, and same shall, upon such notice being given, thereupon stand terminated, unless the Contractor shall, before the expiration of said ten (10) days' notice, agree in writing with the Receivers to reduce the cost per ton to the Receivers for the work and service which the Contractor is obligated under this agreement to perform, to an amount which will make the total cost per ton to the Receivers (including actual cost, plus the compensation per ton currently payable to the Contractor under this agreement, for such work and service and the royalty charge of Eight (8¢) Cents per ton or of Ten (10¢)

Cents per ton, as the case may be, at the time being paid by 167 the Receivers for coal mined and shipped for them by the Contractor, plus such freight or transportation charges), of coal so mined and shipped under said agreement, an amount equal to or less than the total cost per ton to the Receivers of coal delivered at the point of destination, of a grade satisfactory to the Receivers, which they shall be able to purchase in some other coal field.

8. In further consideration of the execution and delivery of this agreement by the Receivers, the Contractor agrees that from and after such time during the continuance of said agreement dated July 10, 1934, as herein supplemented, modified, or amended, and of any renewal or extension thereof herein provided for, as the Contractor shall have paid in full its said loan indebtedness of \$2,400.00, its indebtedness of said additional loan aggregating \$2,600.00 or less, if such additional loan be obtained by it, its said indebtedness to the Receivers aggregating \$22,422.41 and its said lien indebtedness aggregating \$5,281.48, and all accrued interest thereon, the compensation to the Contractor of Ten (10¢) Cents per ton, (or of such lesser amount, if any, then currently payable by the Receivers to the Contractor) over and above the actual cost to the Contractor of extracting, mining, manufacturing, transporting, and loading said coal, in said agreement provided for, shall be reduced the sums of Five (5¢) Cents per ton, and the flat sum or base contract price provided for in paragraph 7 (a) of said agreement dated July 10, 1934, as said sum or price is modified in and by paragraph 3 of this agreement, shall be reduced

accordingly, and such reduced compensation and such reduced flat sum or base contract price shall thereafter, and during the remainder of the period of continuance of said agreement and of such renewal or extension thereof, govern and apply in stead and in lieu, respectively, of the compensation per ton and the flat sum or base contract price per ton payable, immediately prior to the time such reduction becomes effective, by the Receivers to the Con-

tractor under paragraph 7 (a) of said agreement, as modified in and by paragraph 3 of this agreement; but said reduced flat sum or contract price shall be subject to adjustment upward or downward, in accordance with the provisions of said paragraph 7 (a).

9. Said agreement dated July 10, 1934, as herein supplemented, modified, or amended, unless terminated prior to July 17, 1938 under or by virtue of any of the provisions therein or herein contained, shall, at the option of the Receivers, be renewed or extended for the further period of one (1) year from and after July 17, 1938, upon the same terms and conditions as in said agreement, as supplemented, modified, or amended by this agreement, and in this agreement, contained, provided sixty (60) days' previous written notice of the intention of the Receivers to so renew or extend same shall be given by the Receivers to the Contractor.

In testimony whereof, witness the signatures and seals of the parties hereto as of the day and year first above written.

(s) LEGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

Signed, sealed, and delivered by Legh R. Powell, Jr., as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) M. E. CARROLL,

(s) G. M. BISHOP.

Signed, sealed, and delivered by Henry W. Anderson, as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) R. B. COTTRELL,

(s) W. G. JONES.

GLAMORGAN COALS, INCORPORATED.

By (s) R. B. ALSOVER,

Its President.

Attest:

(s) JOHN ROBERTS,

Secretary.

Signed, sealed, and delivered by Glamorgan Coals, Incorporated, in the presence of:

(s) J. R. DALE.

(s) H. B. ADAMS.

169 I hereby certify that the foregoing is a true and correct copy of agreement No. 23781-Sup., dated April 1, 1935, as executed between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Clamorgan Coals, Incorporated, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

170 *Comptroller's Contract No. 23781-B*

This Agreement, made this 10th day of July 1934 between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"), parties of the first part; and Clamorgan Coals, Incorporated, a corporation under the laws of Virginia (hereinafter called "Contractor"), party of the second part:

Whereas, the Receivers propose to Lease from Clamorgan Coal Land Corporation, a corporation under the laws of Virginia (hereinafter called "Landowner") for a term or period of one (1) year beginning on July 17, 1934, with the right in the Receivers at their option of renewal thereof from year to year after July 17, 1935, for four (4) successive years, not exceeding the aggregate period of four (4) years from and after July 17, 1935, the exclusive right and privilege of extracting, mining, manufacturing, and transporting from the mine and loading on cars at the mine tipples for shipment to or for account of the Receivers, the coal in, upon, or under all these certain tracts or boundaries of coal lands, coal rights, and surface rights situated near the Town of Wise, Wise County, Virginia, mentioned and described and leased to the Receivers in and by that certain Deed of Lease dated July 12, 1934, made by and between the Landowner and the Receivers, which Deed of Lease has, prior to or contemporaneously with the execution and delivery of this agreement, been filed for record, or duly recorded, in the public records of said Wise County, and to which Deed of Lease reference is hereby made for a further and more detailed description of said tracts

or boundaries of coal lands, coal rights, and surface rights in and by said Deed of Lease so leased to the Receivers; and

Whereas, the Contractor is the owner of all those certain buildings, tipples, and other structures, and of all the equipment, machinery, appliances, and appurtenances (hereinafter collectively called "improvements") located on the boundaries or tracts of land mentioned and described in said Deed of Lease to the

171 Receivers, necessary or convenient for the extracting, mining, manufacturing, and transporting of said coal from the mine to the tipple, and for loading said coal on railroad cars at the tipple, and the Contractor desires to contract with the Receivers to do and perform, as an independent contractor, the service and work of so extracting, mining, transporting, and loading said coal for use by the Receivers, and to employ and use in the performance of such contract with the Receivers the above-mentioned improvements; now, therefore, this agreement witnesseth:

That the Receivers and the Contractor, in consideration of the mutual benefits, each contracting also in consideration of the covenants of the other party hereto hereinafter contained, covenant and agree as follows:

1. That the Contractor will employ and use the improvements in the performance of its service and work herein contracted for, and will at all times during the continuance of this agreement, or of any extension or renewal hereof, maintain the improvements in good and serviceable working order and condition.

2. The Contractor will, at its sole expense, extract said coal from the mine or mines on said leased premises, mine, manufacture, and transport said coal from the mine to the tipple and load said coal at the tipple on railroad cars ready for shipment by or for account of the Receivers; said coal to be so extracted, mined, manufactured, transported, and loaded by the Contractor to be Mine Run coal which will comply with the specifications of the Receivers for locomotive coal No. 65, revised February 14, 1933, a copy of which specifications is attached hereto as a part hereof marked "Exhibit A." Said coal is to be so extracted, mined, manufactured, transported, and loaded by the Contractor as to insure to the Receivers a regular and constant supply of such coal on railroad cars at the mine tipple, ready for shipment, in substantially equal minimum daily quantities, as follows: During the months from July 17, 1934, to July 17, 1935, the
172 aggregate minimum quantity shall be not less than 120,000 tons in monthly quantities of not less than 10,000 tons, and the aggregate maximum quantity shall be 180,000 tons in monthly quantities of 15,000 tons as may be currently required by the

Receivers. The Receivers will direct the Contractor to mine, produce, and load not less than the minimum tonnage above stated for the twelve months from July 17, 1934, to July 17, 1935.

Should the Contractor at any time, for any cause not made excusable by the provisions of this agreement, fail to mine and so load the monthly quantity of coal above specified, then the Receivers shall have the right, at their option, to purchase coal to make up such shortage at the ruling market price, and the Contractor will, in such case, reimburse the Receivers for any excess cost in procuring such coal.

All coal mined and loaded by the Contractor under this agreement will be reasonably free from slate, soapstone, shale, fire clay, sulphur, "bony coal," and other noncombustible or nearly noncombustible impurities.

The Contractor will load the coal in the Receivers' hopper bottom and drop bottom gondola cars, so far as the same are made available by the Receivers, and/or on other cars as and when previously authorized by the Receivers. The cars will be loaded to full visible capacity, but not exceeding the stencilled load limit, and so loaded that coal will not fall off in transit. The coal so mined and loaded by the Contractor under this agreement is to be shipped by the Receivers, or by the Contractor for their account, to points and via routes as prescribed by the Receivers. When cars of the Receivers are not available in sufficient quantities for loading all shipments hereunder the Contractor will keep the Receivers fully advised by telegram of such condition.

General strikes in the same field, accidents to machinery, railroad embargoes, or other contingencies or casualties beyond the control of the Contractor shall be a sufficient excuse for
173 the complete or partial failure caused thereby of the Contractor to comply with the terms of this agreement until a reasonable time has elapsed for remedying such condition. If the Contractor fails, for any of the aforesaid causes, to mine and/or load the amount of coal herein provided to be mined and loaded, for a continuous period of more than sixty (60) days, then the Receivers shall have the right to cancel this agreement by written notice to that effect given the Contractor.

If the coal mined and loaded by the Contractor hereunder is not of a clean and good steaming character or not mined and/or loaded in accordance with the terms hereof, then the Receivers may in any such case, at their option, cancel this agreement.

All coal mined, produced and/or loaded by the Contractor under this agreement may be inspected at the mines by an authorized representative of the Receivers, and the Receivers will be required to pay the Contractor hereunder for only such coal as is accepted by their authorized representative as being in com-

pliance with this agreement and the attached specifications, such inspection and refusal by the Receivers to pay for coal to be final. When the coal loaded by the Contractor which is not inspected at the mine by the Receivers is believed to be of a grade inferior to that provided for in said specifications, the Receivers will give the Contractor written notice and the Contractor will immediately have its representative inspect the coal jointly with the Receivers' representative, and such representatives will endeavor to agree as to the grade and quality of the coal. In the event of disagreement between such representatives as to ash content, or as to screenings, such questions shall be determined in the manner hereinafter provided, and the result of such determination will be final and conclusive. All coal found to be of inferior grade shall be promptly removed by the Contractor free of all cost or expense to the Receivers. The percentage
 174 of ash content and of screenings shall be ascertained as to each car in question, unless by mutual consent of the representatives of the parties a single car be selected to represent a number of cars and the results of the test made of said car applied to the entire number.

To ascertain the ash content, a representative sample shall be taken and reduced to a laboratory sample by crushing all of the coal to a small size and by quartering and successively rejecting alternate quarters. To obtain a representative sample where it is impracticable to dump the entire contents of the car and sample every portion thereof, the coal shall be collected evenly from throughout three trenches dug at regular intervals across the car, about one foot in width and averaging not less than three feet in depth below the surface of the coal.

The laboratory sample shall be divided between the Receivers and the Contractor and these samples sealed and forwarded immediately for ash determination to two chemists, one to be designated by the Receivers and the other by the Contractor. Should the chemists' results vary two percent. or less, the average of the two analyses shall govern; should they vary more than two percent., a joint sample will be submitted to a third chemist for final analysis; the expenses and fees of such submission to be paid by the party whose own chemists' analysis shows the greater variation from the final analysis.

Should the representatives of the parties disagree respecting the percentage of screenings, a representative sample of approximately one ton shall be passed over a screen (as set out in the attached specifications) set at an angle of forty-five degrees with the horizontal, and the portions thus separated shall be weighed.

The Receivers shall not be required to pay the Contractor for extracting, mining, manufacturing, transporting, and or loading

mine run coal containing over 6% of ash or over 35% of screenings or not otherwise conforming to the said specifications.

The Contractor is, at its sole expense, to perform all service and work of every sort, character, and description, and is to furnish or provide all the labor, materials, supplies, machinery, equipment, appliances, and facilities, necessary or convenient for, or in and about, the performance of all of the service or work of so extracting, mining, manufacturing, transporting, and loading said coal. The Contractor will, at its sole expense, provide, and at all times during the continuance of this agreement maintain, manage, and conduct such organization as is necessary to the efficient and punctual performance by the Contractor of the service and work herein contracted for by it. The Contractor is to conduct said service and work, and its mining operations and the works, on said premises, in a safe, skillful, and workmanlike manner, and in accordance with the rules and methods of good modern coal-mining operations, and in compliance with all laws of the State of Virginia relating hereto, and all other laws, regulations, and code, or other requirements or practices applicable thereto, and shall employ any and all such means and methods as will properly so extract, mine, manufacture, transport, and load said coal.

3. The Contractor will assume and perform all obligations, liabilities, and duties of the Receivers to the Landowner which shall at any time accrue, exist, or arise under or by virtue of the Deed of Lease between the Landowner and the Receivers whereunder the Receivers will lease the rights above mentioned (except the obligation of the Receivers under such Deed of Lease to pay to the Landowner the rental or royalty of 10¢ per ton and/or the minimum royalty, if any, to be provided for in said Deed of Lease between the Landowner and the Receivers), and the Contractor will at all times, and he does hereby (except as to said rental or royalty payments), protect, indemnify, and save harmless the Receivers from and against, and or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise.

4. The Contractor hereby assumes, and will duly and punctually pay and discharge all taxes, assessments, and levies assessed on, against, or in respect of the improvements on said land, and/or on, against, or in respect of all the property or rights, if any (other than on said land), granted the Receivers under said Deed of Lease between the Landowner and the Receivers, including privilege, license, and other taxes, if any, imposed or assessed against the Receivers.

5. The Contractor will, at its sole expense, take out and maintain in full force and effect at all times during the continuance of this agreement, employer's liability, casualty, and such other insurance as is customarily and under prudent and modern mining company practice carried by mining companies, which is not carried for the benefit of the Landowner, in each case, in the aggregate amount, with such insurance company or companies, and under such forms of policies, as shall be approved by the Receivers, to the end that such insurance will adequately and fully protect the respective interests of the Receivers and the Contractor. The loss, if any, under such insurance policies shall be made payable to the Contractor and/or the Receivers, as their respective interests may appear, and the Contractor will, upon request of the Receivers, promptly furnish the Receivers with appropriate certificate or certificates by the insurers that such insurance has been so taken out by the Contractor and is maintained in force as in this section hereof provided.

6. The Contractor will duly and punctually pay all cost and expense of every sort, character, or description necessary to, in, and about or incident or related to the service and work herein agreed to be performed by the Contractor, and the Contractor expressly assumes all risk of, agrees to at all times, and does hereby protect, indemnify, and save harmless the
177 Receivers from and against, and in respect of, accidents, casualties, and all other risks incident to or in respect of the service and work herein contracted for.

The Contractor further assumes all responsibility for and will at all times, and it does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of:

(a) All loss and expense incident to injury, fatal, or otherwise, to persons, and/or damage to property, arising or growing in any manner, directly or indirectly, out of or in connection with (i) the service, work, or any other matter or thing contemplated under this agreement to be carried out, done, or performed by the Contractor; and or (ii) entry by the Contractor, its agents, servants, employees, or representatives, or other persons, in said mine and/or its or their presence in, on or in the vicinity of, and/or use, working or occupancy of, said mine or premises, and/or the buildings, tipples, structures, equipment, machinery, appliances, and appurtenances, now or hereafter located in or on or near said mine or premises.

(b) All taxes, assessments, and levies (except taxes on the land or other taxes, if any, paid by the Landowner) imposed by any Governmental authority or body on or in respect of said mine or premises, buildings, structures, equipment, machinery, appli-

ances, and appurtenances, and/or on or in respect of the rights or privileges of either the Contractor or of the Receivers therein or with respect thereto, and/or the revenues, issues, or profits thereof.

(c) All fines, penalties, and other loss which may result from the actual or alleged violation by the Contractor, its agents, servants, or employees, of any law, ordinance, or regulation of any public authority or body, and all liens, claims, or other liability for or on account of work, labor, materials, or supplies for
178 the service and work contemplated under this agreement.

(d) The terms "expense" and "loss" as used in this section are intended and shall be construed to include attorneys' fees and costs, as well as all other expenses.

7. (a) The Receivers will pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading of coal, and in payment and reimbursement for all the other obligations, matters, and things which the Contractor by the foregoing provisions of this agreement agrees to do and perform, a flat sum of \$1.55 (subject to adjustment as hereinafter provided) per ton of 2,000 pounds of such coal which is so mined, produced, and loaded on railroad cars by the Contractor, conforms to said specifications and passes the inspection of the Receivers; provided, however, that said flat payment per ton shall be subject to adjustment upward or downward depending upon the fluctuations of wages and unit prices over which the Contractor has no control, as hereinafter in this section set forth.

To the extent that the Contractor's costs per ton are increased by increasing the elements of cost as set forth in Exhibit B attached as a part hereof, over which the Contractor has no control, then to that extent the flat base sum of \$1.55 per net ton shall be adjusted upward. Such increased cost per ton shall be computed on tonnage so produced and loaded on railroad cars during the contract year or for such shorter period as this contract shall continue in effect. If the elements of cost per ton shown on Exhibit B are reduced, said flat rate per ton shall be reduced to the extent of such reduction per ton. Contractor agrees to submit to the Receivers a schedule of rates of pay and salaries over which the Contractor has control, such rates not to be put into effect, increased, or added to until the written approval of the Receivers is first obtained. The before-mentioned base contract price of \$1.55 is based on the aggregate of—

(i) actual cost per ton to the Contractor of extracting,
179 mining, manufacturing, transporting, and loading the coal on railroad cars in this agreement provided;

(ii) Contractor's compensation of 10¢ per ton.

It is agreed that the amount payable by the Receivers to the Contractor hereunder shall in no event exceed the aggregate of the above-stated items (i) and (ii) and that in case the actual cost to the Contractor mentioned in said item (i) shall be less than \$1.45 per ton the Receivers shall receive the benefit of such cost reduction, and that any payments as representing actual cost mentioned in said item (i) made by the Receivers to the Contractor in excess of such actual cost shall be adjusted in subsequent settlements between the Receivers and the Contractor hereunder.

Cost shall be computed under this section on tonnage mined, produced, and loaded on railroad cars. Costs of extracting, mining, manufacturing, transporting, and loading cars shall not include any costs of additions, betterments, improvements, or developments to the plant used by the Contractor which are properly chargeable to capital account. The Contractor agrees to keep all of its expenditures on a relatively normal basis and not to voluntarily increase any of the costs over which it has control without first obtaining the written approval of the Receivers. In the ascertainment of costs under this subsection such costs will be based solely on cash outlays made by the Contractor.

In any computation of costs such costs shall include all costs and all revenues referable to commissary and housing of employees.

(b) The Contractor shall have the right to sell for account of the Receivers such of the coal produced by it hereunder as may be necessary to supply the domestic requirements of its employees engaged in the service and work contracted for by it under this agreement. Such coal shall be so sold at the applicable Code price, or, if no Code price be applicable, at the prevailing price for coal 180 so sold in the same field. Payments due for coal so sold shall be collected by the Contractor and the difference between the selling price and the cost to the Contractor of producing and so selling such coal shall be applied or credited against the Contractor's cost of coal produced and loaded under this agreement. A complete record of all such sales shall be kept by the Contractor.

(c) In making payments to the Contractor in respect of coal extracted, mined, manufactured, transported, and loaded under this agreement, the actual weights ascertained by the initial carrier will govern and will be accepted by the parties hereto, except, however, that the Contractor agrees to refund to the Receivers any excess freight charges due to the Contractor's failure to load cars for shipment to the Receivers with the quantity of coal specified by the governing freight tariffs as carload minimum.

(d) The Contractor will issue on the last day of each month

invoice covering all coal loaded by the Contractor under this agreement during that month, showing thereon the number and initials and the total weight of each car, and the net weight of the coal loaded therein. The Receivers will pay the Contractor in respect of all coal extracted, mined, transported, and loaded during each month, not later than the twenty fifth day of the succeeding month, provided the invoices of the Contractor are received not later than the fifth day of the succeeding month.

(e) The payment by the Receivers to the Contractor of the flat sum per ton provided for in Section 7 (a) of this agreement (such sum may be adjusted pursuant to the provisions of this agreement), shall be in full settlement, satisfaction and discharge of and for all the service and work and all the other obligations, matters, and things, which the Contractor in and by this agreement agrees or undertakes to do and perform, or cause to be done and performed, and in full payment, satisfaction, and discharge of all claims, demands, or causes of action of every sort, character, or description of the Contractor under or by virtue of this agreement.

(f) If at any time before the completion of and final settlement with the Contractor for the service, work, matters, or things herein agreed by it to be done or performed, the Receivers shall become subject to or receive notice of any claims or liens for work done or materials or supplies furnished for or on account of said service, work, matters, or things and/or any loss, liability, cost, and expense which the Contractor assumes hereunder and or indemnifies the Receivers against, or if the Contractor is at any time in default in making payments to any subcontractors, laborers, materialmen, or others in connection with said service, work, matters, or things, then the Receivers may, at any time, withhold from all payments due or to become due the Contractor from the Receivers, whether growing out of said service, work, matters, or things, or otherwise, such amount as may, in the opinion of the Receivers, be necessary to reimburse or indemnify the Receivers against all such claims, liens, loss, liability, cost, and expense, whether the same shall or shall not have been definitely liquidated or ascertained, or be in dispute or litigation, and may apply the amount so withheld, or so much thereof as may be necessary, in reimbursing and indemnifying the Receivers.

8. The Contractor will on July 17, 1934, be indebted to the Receivers in a certain principal amount, which indebtedness will on that date be evidenced by promissory notes for the actual aggregate principal amount of such indebtedness then due by the Contractor to the Receivers, which notes will, on July 17,

1934, be held by the Receivers, and each of which notes will bear interest from the date thereof at six percent (6%) per annum. The Contractor is also indebted to certain other parties, in the aggregate principal sum of \$6389.68, said last-mentioned debts being indebtedness secured by certain liens on properties owned by the Contractor and the payment of which was assumed by it in its purchase of said properties. The Contractor agrees that out of the sum of ten cents (10c) per ton payable by the Receivers to the Contractor hereunder over and above the actual cost per ton to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal as in this agreement provided for, the Receivers shall have the right to deduct from each monthly settlement with the Contractor hereunder the sum of eight cents (8c) per ton and apply the amount so deducted in payment of the principal and interest of said notes of the Contractor held by the Receivers, said sum so deducted to be applied on said notes in the order of the respective dates of such notes.

The Contractor further agrees that the remaining two cents (2c) per ton of said ten cents (10c) per ton, as and when paid over to the Contractor by the Receivers, will be promptly applied by the Contractor in payment of said lien indebtedness of the Contractor aggregating \$6369.68 principal amount, such payment by the Contractor to be made at such times and in such manner as the Receivers shall approve.

Anything in this agreement to the contrary notwithstanding, in making payments in respect of coal extracted, mined, manufactured, transported, and loaded by the Contractor under this agreement, the Receivers shall have the right, at any and all times, to offset or deduct the amount of any and all claims and or indebtedness of the Receivers against the Contractor, whether arising under this or any other contract or transaction.

9. The Receivers, or their authorized representatives, shall be given full access to the property, records, and accounts of the Contractor at all times for the purpose of enabling them to ascertain the Contractor's costs, and the Contractor agrees that he will cause his records and accounts to be kept up to date and in an efficient way that will readily enable the Receivers to ascertain such costs.

183 10. The Receivers shall have the right to keep an accountant and or inspector at the mine at their expense, and the Contractor agrees to provide suitable working quarters.

11. This agreement shall, at the option of the receivers, be renewed and extended from year to year, not exceeding an aggregate period of four (4) years from and after July 17, 1935, upon

the same terms and conditions as are herein contained, provided sixty (60) days' previous written notice of the intention of the Receivers to so renew or extend this agreement shall be given by the Receivers to the Contractor.

12. The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence, or omissions of the Contractor, its agents, servants, employees, or representatives.

13. The Contractor shall not assign, sublet, or transfer its rights or obligations under this contract, without the previous written consent of the Receivers.

14. In case of a difference of opinion, or dispute, between the Receivers and the Contractor as to the interpretation of this agreement, or in any manner arising out of the operations conducted under it or because of it, no action at law or suit in Court shall be instituted until the award is had of a Board of Arbitration herein provided for, except to enforce said award which shall be final and conclusive between the parties to the same. Said Board shall be constituted as follows:

Within thirty days after the written notice given by either party to the other, each party shall appoint an arbitrator and the said two arbitrators shall, if necessary to a conclusion, have the power, and it shall be their duty within sixty days from their appointment, to appoint a third; and a decision of the majority of a Board so constituted shall be regarded as the decision of the Board; and, if within the said thirty days, either of the parties shall neglect, fail, or refuse to appoint an arbitrator as required, then the other may appoint an arbitrator to represent the delinquent party whose opinion shall be equally binding as if appointed by the delinquent party aforesaid; and in case of failure on the part of said Board of Arbitration or any of them to act within ninety days after the date of notice given as aforesaid, a new Board may, at the option of either party, be demanded and within thirty days after such demand in writing shall be constituted after the same manner and governed as provided for the first Board, and with the same power to decide; but no person so previously appointed as an arbitrator shall be reappointed to act on the same question.

15. Subject to any right to cancel or terminate this agreement as provided herein or given by law, the provisions of this agreement, so far as they are applicable to the Receivers, shall be binding upon them, and shall inure to the benefit of the Receivers (as Receivers of Seaboard Air Line Railway Company, but not individually) and their successors, the Seaboard Air Line Railway

Company and its successors, the railroad corporation which may, after the termination of the receivership of Seaboard Air Line Railway Company, control and operate the line of railroad and appurtenant physical properties to the business of which the subject matter of this agreement relates, and the successors of such railroad corporation.

16. This agreement is made and entered into by the parties hereto in anticipation that the Landowner will grant to the Receivers the right to take from the said mine during the period from July 17, 1934, to July 17, 1935, the quantity of coal which the Contractor herein agrees to extract, mine, manufacture, transport, and load. It is expressly agreed that the rights and obligations of the Receivers and of the Contractor, respectively, under or by virtue of this agreement are subject to and conditioned upon (a) a valid and effectual grant being made to the Receivers by the
185 Landowner of the right to take or extract said coal from said mine and to contract with the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading said coal, as hereinbefore set forth, and under agreement granting such rights between the Receivers and the Landowner and containing terms and provisions satisfactory to the Receivers.

In testimony whereof, witness the signatures and seals of the parties hereto as of the day and year first above written.

LEIGH R. POWELL, JR., [SEAL]

HENRY W. ANDERSON, [SEAL]

As Receivers of Seaboard Air Line Railway Company.

Signed, sealed, and delivered, as to Leigh R. Powell, Jr., as Receiver of Seaboard Air Line Railway Company, in the presence of:

M. E. CARROLL.

G. M. BISHOP.

Signed, sealed, and delivered, as to Henry W. Anderson, as Receiver of Seaboard Air Line Railway Company, in the presence of:

M. E. CARROLL.

G. M. BISHOP.

CLAMORGAN COALS, INCORPORATED,
By R. B. ALSEVER.

Its President.

Attest:

JOHN ROBERTS, *Secretary.*

Witness:

B. F. ALLEN.

S. J. JARRELL.

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell, Jr., and Henry W. Anderson, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

GLAMORGAN MINE

Mine Run Coal:

Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 4 to 6 percent ash and not more than 35 percent of screenings which will pass through a screen having one inch openings between the bars.

Railroad Screened Coal:

----- Inch Railroad Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than ----- inches in the clear between the bars; or a round hole shaker screen with openings not less than ----- inches in diameter. It must be of a clean and good steaming character containing not more than ----- percent ash and not more than ----- percent of screening which will pass through a screen having one-inch openings between the bars.

Washed -----Inch Railroad Steam Coal:

Washed -----Inch Steam coal, shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a -----inch round-hole shaker screen with openings not less than ----- inches in diameter, then over a round-hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the -----inch bar or -----inch round-hole shaker screen and over the -----inch shaker screen to be carried over a pick-belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the -----inch round hole shaker screen to be thoroughly washed in a jig type washer or over
187 vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump coal and shall contain not more than

----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Run of Mine Railroad Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a ----- inch round hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Steam Coal Screened and Rescreened:

Washed ----- inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a round hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed
188 and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

C. S. PATTON,

General Superintendent Motive Power.

NORFOLK, VA., *February 14th, 1944.*

(1) Where increases only are referred to herein it is understood that the same relative effect will be given to decreases:

provided, however, that no adjustment shall be made for increases unless the increase amounts to at least two cents per ton, for the aggregate of all items enumerated on this Exhibit B, for each contract year or portion thereof that the contract is in effect. No increases are to be allowed in respect of additions, betterments, improvements, or development costs properly chargeable to capital account.

(2) Increases in wages will be allowed over those in effect, pending, or proposed at the effective date of the agreement of which this Exhibit is a part insofar as wages over which the Contractor has no control are concerned, also all increases in compensation insurance due to increases in rates over the rate effective July 1, 1934. No increases will be allowed in respect of wages, rates of pay, or salaries under the control of the Contractor unless specifically agreed to in writing by the Receivers prior to such increase being made effective by the Contractor.

(3) Other elements of costs enumerated below will be based on increases over the average prices of each element paid by the Contractor during the three months period following the effective date of said agreement, provided, however, if in the opinion of the Receivers or the Contractor such prices are not representative, or no purchases have been made during such period, then the prices obtaining as of the date of said agreement will be ascertained by the Receivers' Purchasing Agent from authoritative sources, and such prices so ascertained will be used as a basis for determining increased or decreased costs of such elements of cost, viz:

Ties and props.	Mining machines and parts.
Rails and track fastenings.	Electrical trolley wire and bondings.
Explosives.	Tipple parts.
Motors and parts.	Mules and feed.
Mine cars and parts.	Shovels, picks, drills, jacks, and lubricants.
Fans and parts.	
Pumps and parts.	

190 NOTE.—Items costing less than \$10 each shall be disregarded unless purchased in volume at one time, the aggregate cost of which is in excess of \$10, that is to say, that invoices of \$10 or less will be disregarded in order to save refinement in accounting.

(4) Increases in taxes due to increases in rates of levy or to new taxes lawfully imposed, payable by the Contractor under the agreement of which this Exhibit is a part, on, or in respect of, property or rights (other than on the land) acquired, or to be acquired, by the Receivers of Seaboard Air Line Railway

Company, under agreement (referred to in said first-mentioned agreement) with Glamorgan Coal Land Corporation, and on, or in respect of, property owned or used by, or rights or privileges of, the Contractor in mining, producing, and loading coal under this agreement, will be allowed in computing increased costs to the extent such rates of levy exceed those in effect in 1934.

(5) Increases in the basic scale of power rates will be allowed, but changes in power costs due to the volume of power used shall not be allowed.

191 I hereby certify that the foregoing is a true and correct copy of agreement No. 23781, dated July 10, 1934, as executed between Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Glamorgan Coals, Incorporated, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,
*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

192 *Comptroller's Contract No. 23782-B*

NORFOLK, VA., May 25, 1937.

MR. DANIEL H. PRITCHARD,
P. O. Box 405, Charleston, W. Va.

DEAR MR. PRITCHARD: Referring to your letter-offers to us, and our acceptance thereof, dated April 28, 1937, in respect of the extension and renewal on the basis therein set forth of your agreements to perform for us the work and service therein mentioned at the "William-Ann" and "Chilton Block No. 1" mines, respectively.

It is understood the undersigned will accept membership in the Code as and when promulgated under the Bituminous Coal Act of 1937 and will, as and to the extent of their liability for the excise tax of one cent per ton levied under Section 3 (a) of said Act and for the assessment levied under Section 4 (b) of said Act, pay said taxes and assessments referable to coal produced at said mines, respectively.

It is further understood that in arriving at the flat sum compensation to you stated in said letter-offers of \$1.687 per ton in the "William-Ann" mine case, and \$1.667 per ton in the "Chilton Block No. 1" mine case, the sum of three mills per ton, the estimated maximum amount of said Section 4 (b) assessments, was not included, and that in the event the actual amount of said Section 4 (b) assessments paid by the undersigned shall, during the period of the continuance of your agreement with us, average less than three mills per ton, the compensation per ton payable to you by the undersigned under said agreements, respectively, shall be adjusted upward to the extent of the difference between the amount per ton of such average payment by the undersigned and three mills per ton.

It is further understood that in the event you, instead of the undersigned, should be legally required to pay the excise tax of one cent per ton levied under Section 3 (a) of said Act and/or any assessments levied under Section 4 (b) of said Act, not previously paid by the undersigned and referable to coal produced at said mines, or either thereof, for the undersigned under our existing agreement with you, any and all such taxes and assessments paid by you shall constitute increased elements of cost and, to the extent of such payments by you, the flat sum per ton compensation currently payable to you under said agreements, respectively, shall, subject to and in conformity with the provisions of Exhibit B attached as a part of your existing agreement with us, be adjusted upward.

Yours very truly,

LEGH R. POWELL, JR., and
HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company,

By (S) LEGH R. POWELL, JR.,

Receiver.

The understandings above set forth are hereby accepted and agreed to by the undersigned, this 27th day of May 1937.

(S) DANIEL H. PRITCHARD.

193 I hereby certify that the foregoing is a true and correct copy of agreement No. 237-2-Sup. dated May 25, 1937, as executed between Daniel H. Pritchard and Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of

1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BEITAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

194

Comptroller's Contract No. 23782-B

CHARLESTON, W. VA., Apr. 28, 1937.

TO MESSRS. LEIGH R. POWELL, JR. and HENRY W. ANDERSON, *Receivers of Seaboard Air Line Railway Company, Norfolk, Virginia.*

GENTLEMEN: This letter will confirm the understanding of the undersigned, reached with you today, as follows:

1. That the term or period of the agreement of the undersigned with you, as Receivers of Seaboard Air Line Railway Company, dated May 1, 1934 (as heretofore modified, supplemented, and extended), providing for the performance by the undersigned of the work and service of extracting, mining, manufacturing, transporting, and loading on railroad cars at the mine tippie for you, as such Receivers, the coal therein mentioned at what is known as the "William-Ann" Mine, in Mingo County, West Virginia, is hereby further extended from and after August 31, 1937, to and until September 1, 1938, upon and subject to all the terms, provisions, and conditions contained in said agreement dated May 1, 1934, except as, and to the extent, said terms, provisions, and conditions are, pursuant to said understanding and as hereinafter set forth, further modified and amended, as follows:

2. That Section 2 of said agreement dated May 1, 1934, is hereby so further modified and amended as to provide that during the period on and after May 6, 1937, to and until September 1, 1938, the aggregate minimum quantity of coal which you shall be obligated under said agreement dated May 1, 1934, to direct the undersigned to mine, load, and ship for your account, and which the undersigned shall so mine, load, and ship, shall be 16,500 tons per month, and the aggregate maximum quantity shall be 25,000 tons per month, in such monthly quantities in excess of 16,500 tons as you, as such Receivers, shall currently direct.

3. That on and after May 6, 1937, Section 7 (a) of said agreement dated May 1, 1934, shall cease to be effective or to apply, and the following provisions, effective on and after May 6, 1937, shall be and are substituted in stead and in lieu thereof:

"7 (a). Unless the 'alternate basis' hereinafter mentioned be substituted, as in this section provided for, the Receivers will

(subject to the provisions of Section 4 of this agreement) pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading the coal, and in payment and reimbursement for all the other obligations, matters, and things which the Contractor in and by the foregoing provisions of this agreement agrees to do and perform, the flat sum of \$1.687 per ton of 2,000 pounds of coal which, on and after May 6, 1937, and during the period of the continuance of this agreement is mined, produced, and loaded on railroad cars at said mine for your account, conforms to said specifications and satisfactorily passes the inspection of the Receivers.

195 "It is understood that said flat sum of \$1.687 per ton includes \$1.39 per ton which the Contractor claims represents the average cost per ton of coal to him of the work and service performed by him under this agreement during the period from October 1935 to March 1937, inclusive; that said represented average cost per ton is subject to check and verification by the accounting representatives of the Receivers and that in the event and to the extent such represented average cost per ton figure exceeds the actual cost per ton to the Contractor of such work and service during such period, the said flat sum of \$1.687 per ton is to be reduced accordingly, but that no adjustment upward of such average cost figure per ton shall be made.

"It is also understood that said flat sum of \$1.687 per ton includes the following amounts, aggregating \$0.205 per ton, as representing increases which the Contractor claims have occurred in the respective below-stated elements of cost, viz:

"4¢ per ton, the amount of Social Security taxes referable to coal extracted, mined, manufactured, transported, and loaded by the Contractor for the Receivers hereunder and assessable under existing laws;

"14¢ per ton, account increase in wages effective on and after April 1, 1937, over which the Contractor has no control; and

"2½¢ per ton, amount of increased cost to the Contractor of materials and supplies.

"It is further understood that said specified elements of increased cost are subject to check and verification by accounting representatives of the Receivers; that in the event and to the extent that the aggregate net actual increase in such elements of cost exceeds \$0.205 per ton, the said flat sum of \$1.687 per ton shall be increased accordingly, and that to the extent the aggregate net actual increase in such elements of cost is less than \$0.205 per ton, said flat sum of \$1.687 per ton shall be reduced accordingly.

"Effective on and after the time as of which the adjustments hereinbefore in this Section 7 (a) provided for in said flat price

of \$1.687 per ton shall have been made, to the extent the Contractor's costs per ton are thereafter increased by increases in the elements of cost as set forth in Exhibit B, attached as a part hereof, over which the Contractor has no control, then to that extent the flat sum per ton compensation currently payable to the Contractor hereunder shall, subject to and in conformity with the provisions of said Exhibit B, be adjusted upward. Such increased cost per ton shall be computed on the tonnage so produced and loaded on railroad cars during the contract period, or for such shorter period as the flat rate per ton may be in effect. If after such time the elements of cost per ton shown on said Exhibit B are reduced, the flat rate per ton currently payable to the Contractor hereunder shall be reduced to the extent of such reduction per ton.

196 "The Contractor agrees to submit to the Receivers a schedule of rates of pay and salaries over which the Contractor has control, and that such rates shall not be put into effect, changed, or added to until written approval of the Receivers is first obtained.

"If at any time on and after May 6, 1937, and during the remainder of the continuance of this agreement the Receivers shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to the Receivers at a total cost per ton to the Receivers of less than the amount per ton which the Receivers are at the time obligated under this agreement to pay the Contractor for the work and service performed by the Contractor hereunder, plus the amount per ton then payable by the Receivers to the lessors to them of the coal as rent or royalty and for or on account of taxes payable by the Receivers to their said lessors under the provisions of the Indenture of Lease currently in effect between such lessors and the Receivers, the Receivers shall have the right, at their option, in such event, and from time to time as often as such event shall happen, upon sixty (60) days' previous written notice given by the Receivers to the Contractor of such intention, to terminate this agreement, and this agreement shall, upon such notice being given by the Receivers, thereupon stand terminated, unless the Contractor shall, before the expiration of said sixty (60) days' notice, agree in writing with the Receivers to reduce the cost to the Receivers of said work and service by the Contractor to an amount per ton which, after adding thereto the amount per ton so payable by you for said rent or royalty and for or on account of said taxes, shall be equal to or less than such total cost per ton to the Receivers to purchase such other coal."

4. It is further understood that on and after May 6, 1937, and during the continuance of said agreement dated May 1, 1934, and

of any extension or renewal thereof herein provided for, the coal which the undersigned is obligated under said agreement to mine, load, and ship for you, shall be Crushed 6" Run of Mine Coal, which will comply with your modified specifications, effective on and after May 6, 1937, for such coal, a copy of which modified specifications is hereto attached, and that said modified specifications supersede, on and after May 6, 1937, the specifications which, prior to May 6, 1937, applied to coal mined, produced, manufactured, transported, and loaded for you under said agreement dated May 1, 1934.

5. That said agreement dated May 1, 1934, with the further modifications and amendments thereof herein set forth, shall, at your option, be renewed and extended for the further period of one year from and after August 31, 1938, upon the same terms and conditions thereof, provided seventy-five (75) days' prior written notice of your intention to so renew and extend said agreement shall be given by you to the undersigned.

6. That the terms, provisions, and conditions of said agreement dated May 1, 1934, as further modified, amended, and
197 extended as herein set forth, shall continue in force and effect unaltered and unimpaired.

Yours very truly,

(s) DANIEL H. PRITCHARD.

The above-stated understandings are hereby confirmed and agreed to by the undersigned, this 29th day of April 1937.

LEGH R. POWELL, JR., and

HENRY W. ANDERSON,

as Receivers of Seaboard Air Line Railway Company.

By (s) LEGH R. POWELL, JR.,

Receiver.

198 D. H. PRITCHARD, CONTRACTOR (WILLIAM-ANN MINE)

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell, Jr. and Henry W. Anderson, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

6" Crushed Mine Run Coal:

Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 7 percent ash and not more than 40

percent of screenings which will pass through a screen having one inch openings between the bars. All large lumps to be crushed down not to exceed 6 inches in size.

Screened Coal:

----- Inch Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than ----- inches in the clear between the bars, or a round hole shaker screen with openings not less than ----- inches in diameter. It must be of a clean and good steaming character containing not more than ----- percent ash and not more than ----- percent of screenings which will pass through a screen having one inch openings between the bars.

Washed ----- Inch Steam Coal:

Washed ----- Inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a ----- inch round hole shaker screen with openings not less than ----- inches in diameter, then over a round hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round hole shaker screen and over the ----- inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump coal and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Run of Mine Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a ----- inch round hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the

railroad car evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Steam Coal Screened and Rescreened:

Washed ----- inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a round hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

E. H. Roy,

General Superintendent Motive Power.

NORFOLK, VA., May 20th, 1936.

199 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782 Sup. dated April 20, 1937, as executed between Leigh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company and Daniel H. Pritchard, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

CHARLESTON, W. VA., June 30, 1936.

To MESSRS. LEGH R. POWELL, JR., and HENRY W. ANDERSON,
as *Receivers of Seaboard Air Line Railway Company,*
Norfolk, Virginia.

GENTLEMEN: This letter will confirm verbal understanding of the undersigned with you that effective on and after June 30, 1936, that certain Supplemental Agreement, dated June 18, 1936, between you and the undersigned in respect of the extension and renewal as, and upon and subject to the terms and provisions, in said agreement dated June 18, 1936, set forth, of the existing agreement therein mentioned dated May 1, 1934, between you and the undersigned, as Contractor, is by mutual consent of you and the undersigned, as such Contractor, amended and modified as follows:

(a) By eliminating all of paragraph numbered 2 of said Supplemental Agreement dated June 18, 1936, and substituting in lieu thereof new paragraph numbered 2, reading as follows:

"2. That Section 2 of said agreement dated May 1, 1934, as heretofore extended, is hereby so modified and amended as to provide that during the period from and after July 1, 1936, to September 1, 1937, the aggregate minimum quantity of coal which the Receivers shall be obligated under said agreement dated May 1, 1934, as so extended, to direct the Contractor to mine, produce, and load, shall be 15,000 tons per month, and the aggregate maximum quantity shall be 20,800 tons per month, in such monthly quantities in excess of 15,000 tons as the Receivers shall currently direct."

(b) By eliminating all of paragraph numbered 3 of said agreement dated June 18, 1936, and substituting in lieu thereof new paragraph numbered 3 reading as follows:

"3. That on and after July 1, 1936, Section 7 (a) of said agreement dated May 1, 1934, shall cease to be effective or to apply, and the following provisions shall, effective on and after July 1, 1936, be, and are hereby, substituted instead and in lieu thereof:

"7. (a) Unless the "alternate basis" hereinafter mentioned be substituted, as in this section provided for, the Receivers will (subject to the provisions of Section 4 of this agreement) pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading the coal, and
201 in payment and reimbursement for all the other obligations, matters, and things which the Contractor in and by the foregoing provisions of this agreement agrees to do and perform, the following amounts per ton of 2,000 pounds of coal

which is so mined, produced, and loaded on railroad cars by the Contractor for the Receivers, conforms to the said specifications and satisfactorily passes the inspection of the Receivers:

"(i) During the period beginning on July 1, 1936, and ending on September 4, 1936, for and as applicable to the minimum of 15,000 tons per month which the Receivers are obligated under this agreement to direct the Contractor to mine, produce, and load, the flat sum per said ton which shall be equal to the amount of the average flat sum per ton which would, under the schedule of payments to the Contractor under this agreement, in effect prior to July 1, 1936, be due and payable to the Contractor for and in respect of the tonnage mined, produced, and loaded by the Contractor during the twelve months' period ended on June 30, 1936; and, for and as applicable to the quantity of coal in excess of said minimum which the Contractor shall, during the period beginning on July 1, 1936, and ending on September 4, 1936, mine, produce, and load for the Receivers, the flat sum of \$1.335 per said ton.

"(ii) During the period from and after September 4, 1936, to September 1, 1937, the flat sum of \$1.335 per said ton, for and as applicable to all of the coal which is so mined, produced, and loaded on railroad cars by the Contractor for the Receivers; provided, however, that said flat payments per ton shall be subject to adjustment upward or downward, depending upon fluctuations in wages or unit prices over which the Contractor has no control, as hereinafter in this section set forth.

"To the extent the Contractor's costs per ton are increased by increases in the elements of cost as set forth in Exhibit B attached as a part hereof, over which the Contractor has no control, then to that extent the flat sum per ton shall be adjusted upward. Such increased cost per ton shall be computed on the tonnage so produced and loaded on railroad cars during the contract period, or for such shorter period as the flat rate per ton may be in effect. If the elements of cost per ton shown on said Exhibit B are reduced, said flat rate per ton shall be reduced to the extent of such reduction per ton.

"The Contractor agrees to submit to the Receivers a schedule of rates of pay and salaries over which the Contractor has control, and that such rates shall not be put into effect, changed, or added to until written approval of the Receivers is first obtained.

"If at any time after July 1, 1936, and during the remainder of the continuance of this agreement, the Receivers shall be able to purchase in the same coal fields other coal of a grade and quality satisfactory to the Receivers at a total cost per ton to the

Receivers of less than the amount per ton which the Receivers are at the time obligated under this agreement to pay the Contractor for the work and service performed by the Contractor hereunder, plus the amount per ton then payable by the Receivers to the lessors to them of the coal as rent or royalty and
 202 for or on account of taxes payable by the Receivers to their said lessors under the provisions of the Indenture of Lease currently in effect between such lessors and the Receivers, the Receivers shall have the right, at their option, in such event, and from time to time as often as such event shall happen, upon sixty (60) days' previous written notice given by the Receivers to the Contractor of such intention, to terminate this agreement, and this agreement shall, upon such notice being given by the Receivers, thereupon stand terminated, unless the Contractor shall, before the expiration of said sixty (60) days' notice, agree in writing with the Receivers to reduce the cost to the Receivers of said work and service by the Contractor to an amount per ton equal to or less than such total cost per ton to the Receivers to purchase such other coal."

(c) By eliminating all of paragraph numbered 5 of said Supplemental Agreement dated June 18, 1936, and substituting in lieu thereof new paragraph numbered 5 reading as follows:

"5. That on and after July 1, 1936, and during the continuance of said existing agreement dated May 1, 1934, and of any extension or renewal thereof herein provided for, the coal which the Contractor is obligated under said agreement to mine, produce, manufacture, transport, and load for the Receivers shall be Modified 6" Resultant coal which will comply with the modified specifications of the Receivers for such coal, copy of which modified specifications is hereto attached as a part of this supplemental agreement, and it is agreed shall, and do, supersede on and after July 1, 1936, the specifications marked Exhibit A attached to said agreement dated May 1, 1934, and, until July 1, 1936, constituting a part thereof."

It is further understood that said Supplemental Agreement dated June 18, 1936, shall, with the aforesaid amendments and modifications thereof, continue in full force and effect.

Yours very truly,

(-) DANIEL H. PRETTIARD,

The above-stated understandings are hereby confirmed and agreed to by the undersigned, this the 30th day of June 1936.

(-) LEIGH R. POWELL, JR.,

(-) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

203 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup., dated June 30, 1936, as executed between Daniel H. Pritchard and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN.

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

204 *Comptroller's Contract No. 23782-B*

THIS SUPPLEMENTAL AGREEMENT, Made this 18th day of June 1936, between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"), parties of the first part; and Daniel H. Pritchard, of Charleston, West Virginia (hereinafter called "Contractor"), party of the second part; witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of their existing agreement, dated May 1, 1934, as heretofore extended to and inclusive of September 4, 1936, providing for the performance by the Contractor of the work and service of extracting, mining, manufacturing, transporting, and loading for the Receivers the coal therein mentioned at what is known as the "William-Ann" Mine, in Mingo County, West Virginia, is hereby further extended from and after September 4, 1936, to and until September 1, 1937, upon and subject to all the terms, provisions, and conditions contained in said agreement dated May 1, 1934, as heretofore so extended, and as and to the extent that said terms, provisions, and conditions are in and by this Supplemental Agreement supplemented, modified, or amended.

2. That Section 2 of said agreement dated May 1, 1934, as heretofore extended, is hereby so modified and amended as to provide that during the period from and after September 4, 1936, to September 1, 1937, the aggregate minimum quantity of coal which the Receivers shall be obligated, under said agreement

dated May 1, 1934, as so extended, to direct the Contractor to mine, produce, and load, shall be 15,000 tons per month, and the aggregate maximum quantity shall be 20,800 tons per month, in such monthly quantities in excess of 15,000 tons as the Receivers shall currently direct.

3. That on and after September 5, 1936, Section 7 (a) of said agreement dated May 1, 1934, shall cease to be effective or to apply and the following provisions shall, effective on and after September 5, 1936, be, and are hereby, substituted in stead and in lieu thereof:

265 "7. (a) During the period from and after September

4, 1936, to September 1, 1937 (and unless the 'alternate basis' hereinafter mentioned be substituted, as in this section provided for) the Receivers will (subject to the provisions of Section 4 of this agreement) pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading the coal, and in payment and reimbursement for all the other obligations, matters and things which the Contractor in and by the foregoing provisions of this agreement agrees to do and perform, the flat sum of \$1.335 per ton of 2,000 pounds of coal which is so mined, produced, and loaded on railroad cars by the Contractor for the Receivers, conforms to the said specifications and satisfactorily passes the inspection of the Receivers, provided, however, that said flat payment per ton shall be subject to adjustment upward or downward depending upon fluctuations in wages or unit prices over which the Contractor has no control, as hereinafter in this section set forth.

"To the extent the Contractor's costs per ton are increased by increases in the elements of cost as set forth in Exhibit B attached as a part hereof, over which the Contractor has no control, then to that extent the flat sum per ton shall be adjusted upward. Such increased cost per ton shall be computed on the tonnage so produced and loaded on railroad cars during the contract period, or for such shorter period as the flat rate per ton may be in effect. If the elements of cost per ton shown on said Exhibit B are reduced, said flat rate per ton shall be reduced to the extent of such reduction per ton.

"The Contractor agrees to submit to the Receivers a schedule of rates of pay and salaries over which the Contractor has control, and that such rates shall not be put into effect, changed or added to until written approval of the Receivers is first obtained.

"If at any time after September 5, 1936, and during the remainder of the continuance of this agreement, the Receivers

shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to the Receivers at a total cost per ton to the Receivers of less than the amount per ton which the Receivers are at the time obligated under this agreement to pay the Contractor for the work and service performed by the Contractor hereunder, plus the amount per ton then payable by the Receivers to the lessors to them of the coal as rent or royalty and for or on account of taxes payable by the Receivers to their said lessors under the provisions of the Indenture of Lease currently in effect between such lessors and the Receivers, the Receivers shall have the right, at their option, in such event, and from time to time as often as such event shall happen, upon sixty (60) days' previous written notice given by the Receivers to the Contractor of such intention, to terminate this agreement, and this agreement shall, upon such notice being given by the Receivers, thereupon stand terminated, unless the Contractor shall, before the expiration of said sixty (60) days' notice, agree in writing with the Receivers to reduce the cost to the Receivers of said work and service by the Contractor to an amount per ton equal to or less than such total cost per ton to the Receivers to purchase such other coal."

206 4. That said existing agreement dated May 1, 1934, as heretofore, and in and by this Supplemental Agreement, extended and renewed, shall, at the option of the Receivers, be renewed and extended from year to year, not exceeding an aggregate period of two (2) years, from and after August 31, 1937, upon the same terms and conditions thereof, as same are supplemented, modified, and amended in and by this Supplemental Agreement, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew and extend said agreement dated May 1, 1934, as herein supplemented, modified, and amended, shall be given by the Receivers to the Contractor.

5. That on and after September 5, 1936, and during the continuance of said existing agreement dated May 1, 1934, and of any extension or renewal thereof herein provided for, the coal which the Contractor is obligated under said agreement to mine, produce, manufacture, transport, and load for the Receivers shall be Modified 6" resultant coal which will comply with the modified specifications of the Receivers for such coal, copy of which modified specifications is hereto attached as a part of this supplemental agreement, and it is agreed shall, and do, supersede on and after September 5, 1936, the specifications marked Exhibit A attached to said agreement dated May 1, 1934, and, until September 5, 1936, constituting a part thereof.

6. That the terms, provisions, and conditions of said agreement dated May 1, 1934, as heretofore, and in and by this supplemental agreement, extended and renewed, and as supplemented, modified, and amended in and by this Supplemental Agreement, shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, Witness the signatures and seals of the parties hereto, as of the day and date first above written.

(s) LEGH R. POWELL, Jr., [SEAL]

(s) HENRY W. ANDERSON. [SEAL]

207 Signed, sealed, and delivered by Legh R. Powell, Jr., as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) L. B. PLUMMER.

Signed, sealed, and delivered by Henry W. Anderson, as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) L. B. PLUMMER.

(s) DANIEL H. PRITCHARD. [SEAL]

Signed, sealed, and delivered by Daniel H. Pritchard, in the presence of:

(s) BUFORD C. TYNES.

208 D. H. PRITCHARD, CONTRACTOR—WILLIAM ANN MINE

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell, Jr., and Henry W. Anderson, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

6" Crushed Mine Run Coal:

Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 7 percent ash and not more than 40 percent of screenings which will pass through a screen having one-inch openings between the bars. All large lumps to be crushed down not to exceed 6 inches in size.

Screened Coal:

6-Inch Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than x inches in the clear between the bars, or a round-hole shaker screen with openings not less than 6 inches in diameter. It must be of a clean and good steaming character containing not more

than 7 percent ash and not more than 40 percent of screenings which will pass through a screen having one-inch openings between the bars, with the privilege of removing from such screened coal, during the course of any day's run the 2" x 0" size, in an amount aggregating approximately 5% of the screened product during the course of any day's run.

Washed ----- Inch Steam Coal:

Washed ----- Inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a ----- inch round hole shaker screen with openings not less than ----- inches in diameter, then over a round-hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round-hole shaker screen and over the ----- inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round-hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand-picked lump coal and shall contain not more than ----- percent of screenings which will pass through a round-hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Run of Mine Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a ----- inch round-hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand-picked lump and shall contain not more than ----- percent of screenings which will pass through a round-hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Steam Coal Screen and Rescreened:

Washed ----- inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a round-hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round-hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed and shall contain not more than ----- percent of screenings which will pass through a round-hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

E. H. ROY.

General Superintendent Motive Power.

NORFOLK, VA., May 20th, 1936.

209 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup. dated June 18, 1936, as executed between Leigh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company and Daniel H. Pritchard, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRETTAIN.

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

210

Comptroller's Contract No. 23782 B

This SUPPLEMENTAL AGREEMENT, Made this 5th day of June, 1936, between Daniel H. Pritchard, of Charleston, W. Va. (hereinafter called "Contracter"), and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"); witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of their existing agreement dated May 1, 1934 (as heretofore extended), providing for the performance by the Contractor of certain work and service of extracting, mining, manufacturing, transporting, and loading for the Receivers the coal therein mentioned at what is known as the "William-Ann" Mine, in Mingo County, West Virginia, is hereby further extended from and after August 20, 1936, to and inclusive of September 4, 1936.

2. That the Receivers shall have the right, at their option, to renew and extend said agreement, upon the same terms and conditions as are therein contained, (a) beyond September 4, 1936, and, from and after that date, to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said agreement to July 1, 1937, shall be given by the Receivers to the Contractor on or before June 19, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend said agreement beyond June 30, 1937, shall be given by the Receivers to the Contractor.

3. The foregoing provisions of this agreement are subject to the condition that in the event the Receivers shall elect prior to June 19, 1936, to renew said existing agreement, the extended period of such agreement provided for in Section 1 of this supplemental agreement shall be reduced, and the renewal period thereof (to begin upon the expiration of such reduced period) shall be increased by the number of days equal to the number of days prior to June 19, 1936, on which notice shall be given to the Contractor by the Receivers of such renewal election.

4. That, except as herein modified, the terms and provisions of said existing agreement dated May 1, 1934 (as heretofore extended), shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, Witness the signatures and seals of the parties hereto, as of the day and date first above written.

(s) D. H. PRITCHARD, [SEAL]
L. R. POWELL, JR., and
HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By ———, Receiver. [SEAL]

212 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-SUP, dated June 5, 1936, as executed between Daniel H. Pritchard and L. R. Powell, Jr., and

Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C. before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
*Custodian of Contracts for
 Receivers of Seaboard Air Line Railway Co.*

213

Comptroller's Contract No. 23782-B

THIS SUPPLEMENTAL AGREEMENT, Made this 14th day of May, 1936, between Daniel H. Pritchard, of Charleston, W. Va. (hereinafter called "Contractor"), and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"): witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of their existing agreement dated May 1, 1934 (as heretofore extended), providing for the performance by the Contractor of certain work and service of extracting, mining, manufacturing, transporting, and loading for the Receivers the coal therein mentioned at what is known as the "William-Ann" Mine, in Mingo County, West Virginia, is hereby further extended from and after July 31, 1936, to and inclusive of August 20, 1936.

2. That the Receivers shall have the right, at their option, to renew and extend said agreement, upon the same terms and conditions as are therein contained, (a) beyond August 20, 1936, and, from and after that date, to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said agreement to July 1, 1937, shall be given by the Receivers to the Contractor on or before June 5, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend said agreement beyond June 30, 1937, shall be given by the Receivers to the Contractor.

3. That, except as herein modified, the terms and provisions of said existing agreement dated May 1, 1934 (as heretofore ex-

tended), shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, Witness the signatures and seals of
214 the parties hereto, as of the day and date first above written.

(s) DANIEL H. PRITCHARD. [SEAL]
L. R. POWELL, JR., and
HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By ————, Receiver. [SEAL]

215 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup. dated May 14, 1936, as executed between Daniel H. Pritchard and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BEITTAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

216 *Comptroller's Contract No. 23782-B*

This SUPPLEMENTAL AGREEMENT, Made this 14th day of April 1936, between Daniel H. Pritchard, of Charleston, W. Va. (hereinafter called "Contractor"), and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers"); witnesseth:

That the parties hereto, in consideration of their mutual covenants hereinafter contained, hereby agree as follows:

1. That the term or period of their existing agreement dated May 1, 1934, providing for the performance by the Contractor of certain work and service of extracting, mining, manufacturing, transporting, and loading for the Receivers the coal therein mentioned at what is known as the "William-Ann" Mine, in Mingo County, West Virginia, is hereby extended from and after June 30, 1936, to and until July 16, 1936.

2. That the Receivers shall have the right, at their option, to renew and extend said agreement, upon the same terms and

conditions as are therein contained, (a) beyond July 15, 1936, and, from and after that date, to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said agreement to July 1, 1937, shall be given by the Receivers to the Contractor on or before May 1, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend said agreement beyond June 30, 1937, shall be given by the Receivers to the Contractor.

3. That if the United States Supreme Court shall not, before May 1, 1936, render its decision upon the question of the constitutionality of the Act of Congress, approved August 30, 1935, known as the Bituminous Coal Conservation Act, in the case of Carter v. Carter Coal Company, Docket No. 636, now before that Court for decision, then, in such event, the term or period of said existing agreement dated May 1, 1934, is hereby
217 extended from and after July 15, 1936, to and until August 1, 1936; and in the event such further extension to August

1, 1936, shall become effective, the Receivers shall have the right at their option to renew and extend said agreement, upon the same terms and conditions as are therein contained, (a) beyond July 31, 1936, and for the period from and after that date to July 1, 1937, provided previous written notice of the intention of the Receivers to so renew and extend said agreement to July 1, 1937, shall be given by the Receivers to the Contractor on or before May 15, 1936, and (b) from year to year, not exceeding an aggregate period of two (2) years, from and after June 30, 1937, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend said agreement beyond June 30, 1937, shall be given by the Receivers to the Contractor.

4. That, except as herein modified, the terms and provisions of said existing agreement dated May 1, 1934, shall continue in full force and effect unaltered and unimpaired.

In testimony whereof, Witness the signatures and seals of the parties hereto, as of the day and date first above written.

DANIEL H. PRITCHARD. [SEAL]

L. R. POWELL, Jr., and

HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

By L. R. POWELL, Jr., [SEAL]

Receiver.

218 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782-Sup., dated April 14, 1936, as executed between Daniel H. Pritchard, and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.

219 Comptroller's Contract No. 23782-B

U. S. Registered Mail.

NORFOLK, VA., April 6th, 1935.

TO DANIEL H. PRITCHARD, Contractor,

P. O. Box 1252, Charleston, W. Va.

DEAR MR. PRITCHARD: Referring to your agreement dated May 1, 1934, with the undersigned, providing for the performance by you, as an independent contractor, of certain work and service of extracting, mining, manufacturing, transporting, and loading the coal therein mentioned for the undersigned:

You are hereby notified that pursuant to the provisions of paragraph 11 of said agreement, the undersigned elect to renew and extend said agreement for the period of one year beginning on July 1, 1935, and ending on June 30, 1936, upon the same terms and conditions as in said agreement contained, and that said agreement is accordingly so renewed and extended.

Yours very truly,

(Signed) LEGH R. POWELL,

(Signed) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

Copy to: Mr. W. R. C. Cocke, Mr. E. C. Bagwell, Mr. R. P. Jones, Mr. J. L. Brown.

220 I hereby certify that the foregoing is a true and correct copy of letter dated April 6, 1935, from L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Ry. Co., to Daniel H. Pritchard, Contractor, the original of which

letter was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original letter is one of the permanent records of the Receivers, entrusted to me and held in my possession as custodian of their contracts.

*Custodian of Contracts for Receivers
of Seaboard Air Line Railway Company.*

221

Comptroller's Contract No. 23782-B

This AGREEMENT, Made this 1st day of May 1934, between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, hereinafter called "Receivers," parties of the first part; and Daniel H. Pritchard, of Charleston, West Virginia, hereinafter called "Contractor," party of the second part;

Whereas, the Receivers, propose to purchase or otherwise acquire from United Thacker Coal Company, a corporation of Maine, and the Cole & Crane Real Estate Trust (hereinafter collectively called "Landowner"), the exclusive right and privilege of extracting, mining, manufacturing, and transporting, through, under, and over the premises known as the William Ann Mine properties, located in Mingo County, West Virginia, during the period from May 1, 1934, to July 1, 1935, not less than an aggregate of 198,000 tons of coal for use by the Receivers, together with the further right and privilege of contracting with an independent contractor for the service and work of extracting, mining, manufacturing, transporting, and loading said coal at the mine tipple on railroad cars for the Receivers; and

Whereas, the Contractor proposes to purchase or otherwise acquire, from the Landowner the right and privilege of using all buildings, tipples, and other structures and all equipment, machinery, appliances, and appurtenances on said premises necessary or convenient for the extracting, mining, manufacturing, and transportation of said coal from the mine to the tipple and for loading said coal on railroad cars at the tipple, and desires to contract with the Receivers to do and perform the service and work of so extracting, mining, manufacturing, transporting, and loading said coal for use by the Receivers.

Now, therefore, this agreement witnesseth:

That the Receivers and the Contractor, in consideration of the mutual benefits, each contracting also in consideration of the covenants of the other party hereto hereinafter contained, covenant, and agree as follows:

1. That the Contractor will purchase or otherwise acquire
222 from the Landowner the right and privilege of using all buildings, tipples, and other structures and all equipment, machinery, appliances, and appurtenances located on said premises necessary or convenient for the extracting, mining, manufacturing, and transportation of said coal from the mine to the tipple and for loading same at the tipple on railroad cars ready for shipment by the Receivers.

2. The Contractor will, at his sole expense, extract said coal from said mine, mine, manufacture, and so transport and load said coal; said coal to be so extracted, mined, manufactured, transported, and loaded by the Contractor to be 6-inch Mine Run Coal which will comply with the specifications of the Receivers for locomotive coal No. 65, revised February 14, 1933, a copy of which specifications is attached hereto as a part hereof marked Exhibit A. Said coal is to be so extracted, mined, manufactured, transported, and loaded by the Contractor as to insure to the Receivers a regular and constant supply of such coal on railroad cars at the mine tipple, ready for shipment, in substantially equal minimum daily quantities, as follows: During the months of May and June 1934, 7,000 and 11,000 tons per month, respectively. During the months from July 1, 1934, to July 1, 1935, the aggregate minimum quantity shall be not less than 180,000 tons in monthly quantities of not less than 15,000 tons, and the aggregate maximum quantity shall be 250,000 tons in such monthly quantities in excess of 15,000 tons as may be currently required by the Receivers. The Receivers will direct the Contractor to mine, produce, and load the tonnage above stated for the months of May and June 1934 and not less than the minimum tonnage above stated for the twelve months from July 1, 1934, to July 1, 1935.

Should the Contractor at any time, for any cause not made excusable by the provisions of this agreement, fail to mine and so load the monthly quantity of coal above specified, then the Receivers shall have the right, at their option, to purchase coal to make up such shortage, at the ruling market price, and the

Contractor will, in such case, reimburse the Receivers for
223 any excess cost in procuring such coal.

All coal mined and loaded by the Contractor under this agreement will be reasonably free from slate, soapstone, shale, fire clay, sulphur, "bony coal," and other noncombustible or nearly noncombustible impurities.

The Contractor will load the coal in the Receivers' hopper bottom and drop bottom gondola cars, so far as the same are made available by the Receivers, and/or on the other cars as and when previously authorized by the Receivers. The cars will be loaded to full visible capacity, but not exceeding the stencilled load limit, and so loaded that coal will not fall off in transit. The coal so mined and loaded by the Contractor under this agreement is to be shipped by the Receivers, or by the Contractor for their account, to points and via routes as prescribed by the Receivers. When cars of the Receivers are not available in sufficient quantity for loading all shipments hereunder the Contractor will keep the Receivers fully advised by telegram of such condition.

General strikes in the same field, accidents to machinery, railroad embargoes or other contingencies or casualties beyond the control of the Contractor shall be a sufficient excuse for the complete or partial failure caused thereby of the Contractor to comply with the terms of this agreement until a reasonable time has elapsed for remedying such condition. If the Contractor fails, for any of the aforesaid causes, to mine and/or load the amount of coal herein provided to be mined and loaded, for a continuous period of more than sixty (60) days, then the Receivers shall have the right to cancel this agreement by written notice to that effect given the Contractor.

If the coal mined and loaded by the Contractor hereunder is not of a clean and good steaming character or not mined and/or loaded in accordance with the terms hereof, then the Receivers may in any such case, at their option, cancel this agreement.

All coal mined, produced and/or loaded by the Contractor under this agreement may be inspected at the mines by an authorized representative of the Receivers, and the Receivers will be required to pay the Contractor hereunder for only such coal as is accepted by their authorized representative as being in compliance with this agreement and the attached specifications, such inspection and refusal by the Receivers to pay for coal to be final. When the coal loaded by the Contractor which is not inspected at the mine by the Receivers is believed to be of a grade inferior to that provided for in said specifications, the Receivers will give the Contractor written notice and the Contractor will immediately have his representative inspect the coal jointly with the Receivers' representative, and such representatives will endeavor to agree as to the grade and quality of the coal. In the event of disagreement between such representatives as to ash content, or as to screenings, such questions shall be determined in the manner hereinafter provided, and the result of such determination will be final and conclusive. All coal found to be of inferior grade shall be promptly removed by the Contractor free

of all cost or expense to the Receivers. The percentage of ash content and of screening shall be ascertained as to each car in question, unless by mutual consent of the representatives of the parties a single car be selected to represent a number of cars and the results of the test made of said car applied to the entire number.

To ascertain the ash content, a representative sample shall be taken and reduced to a laboratory sample by crushing all of the coal to a small size and by quartering and successively rejecting alternate quarters. To obtain a representative sample where it is impracticable to dump the entire contents of the car and sample every portion thereof, the coal shall be collected evenly from throughout three trenches dug at regular intervals across the car, about one foot in width and averaging not less than three feet in depth below the surface of the coal.

The laboratory sample shall be divided between the Receivers and the Contractor and these samples sealed and forwarded immediately for ash determination to two chemists, one to be designated by the Receivers and the other by the Contractor. Should the chemists' results vary two percent or less, the average of the two analyses shall govern; should they vary more than two percent, a joint sample will be submitted to a third chemist for final analysis; the expenses and fees of such submission to be paid by the party whose own chemists' analysis shows the greater variation from the final analysis.

Should the representatives of the parties disagree respecting the percentage of screenings, a representative sample of approximately one ton shall be passed over a screen (as set out in the attached specifications) set at an angle of forty-five degrees with the horizontal, and the portions thus separated shall be weighed.

The Receivers shall not be required to pay the Contractor for extracting, mining, manufacturing, transporting, and or loading mine run coal containing over 7% of ash or over 40% of screenings or not otherwise conforming to the said specifications.

The Contractor is, at his sole expense, to perform all service and work of every sort, character, and description, and is to furnish or provide all the labor, materials, supplies, machinery, equipment, appliances, and facilities, necessary or convenient for, or in and about, the performance of all of the service or work of so extracting, mining, manufacturing, transporting, and loading said coal. The Contractor will, at his sole expense, provide and at all times during the continuance of this agreement maintain, manage, and conduct such organization as is necessary to the efficient and punctual performance by the Contractor of the service and work herein contracted for by him. The Contractor

is to conduct said service and work, and his mining operations and the works, on said premises in a safe, skillful, and workman-like manner and in accordance with the rules and methods of good modern coal mining operations and in compliance with all laws of the State of West Virginia relating thereto, and all other laws, regulations, and code or other requirements
 226 or practices applicable thereto, and shall employ any and all such means and methods as will properly so extract, mine, manufacture, transport, and load said coal.

3. The Contractor will assume and perform all obligations, liabilities, and duties of the Receivers to the Landowner which shall at any time accrue, exist, or arise under or by virtue of the agreement between the Receivers and the Landowner whereunder the Receivers will purchase or otherwise acquire the rights above mentioned (except the obligation of the Receivers under such agreement to pay to the Landowner the rental or royalty of 9c per ton and/or the minimum royalty, if any, to be provided for in said agreement between the Receivers and the Landowner, and except taxes required under said agreement to be paid by the Receivers on the land and for which provisions is hereinafter made), and the Contractor will at all times, and he does hereby (except as to said rental or royalty payments and said taxes) protect, indemnify, and save harmless the Receivers from and against, and/or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise.

4. The Receivers will pay all taxes, assessments, and levies assessed on or against the land required to be paid by them thereon under said agreement between the Receivers and the Landowner. The Contractor hereby assumes and will duly and punctually pay and discharge all taxes, assessments, and levies assessed on, against, or in respect of the improvements on said land and/or all other property or rights acquired by the Contractor under or by virtue of his said agreement with the Landowner, and/or on, against, or in respect of all property or rights, if any (other than on said land) granted the Receivers under said agreement between the Receivers and the Landowner, including privilege, license, and other taxes, if any, imposed or assessed against the Receivers.

5. The Contractor will, at his sole expense, take out and maintain in full force and effect at all times during the continuance of this agreement, employer's liability, casualty, and such other insurance as is customarily and under prudent and modern mining company practice carried by mining companies, which is not
 227 carried for the benefit of the Landowner, in each case, in the aggregate amount, with such insurance company or

companies and under such forms of policies, as shall be approved by the Receivers, to the end that such insurance will adequately and fully protect the respective interests of the Receivers and the Contractor. The loss, if any, under such insurance policies shall be made payable to the Contractor and/or the Receivers, as their respective interests may appear, and the Contractor will, upon request of the Receivers, promptly furnish the Receivers with appropriate certificate or certificates, by the insurers that such insurance has been so taken out by the Contractor and is maintained in force as in this section hereof provided.

6. The Contractor will duly and punctually pay all cost and expense of every sort, character, or description necessary to, in, and about or incident or related to the service and work herein agreed to be performed by the Contractor, and the Contractor expressly assumes all risk of, agrees to at all times, and does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of, accidents, casualties, and all other risks incident to or in respect of the service and work herein contracted for.

The Contractor further assumes all responsibility for and will at all times, and he does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of:

(a) All loss and expense incident to injury, fatal or otherwise, to persons, and/or damage to property, arising, or growing in any manner, directly or indirectly, out of or in connection with (i) the service, work, or any other matter of thing contemplated under this agreement to be carried out, done, or performed by the Contractor; and/or (ii) entry by the Contractor, his agents, servants, employees, or representatives, or other persons, in said mine and/or his or their presence in, on or in the vicinity of, and/or use, working, or occupancy of, said mine or premises, and/or the buildings, tipples, structures, equipment, machinery, appliances, and appurtenances, now or hereafter located in or on or near said mine or premises.

228 (b) Subject to the provisions of Section 4 of this agreement, all taxes, assessments, and levies imposed by any Governmental authority or body on or in respect of said mine or premises, buildings, structures, equipment, machinery, appliances, and appurtenances, and/or on or in respect of the rights or privileges of either the Contractor or of the Receivers therein or with respect thereto, and/or the revenues, issues, or profits thereof.

(c) All fines, penalties, and other loss which may result from the actual or alleged violation by the Contractor, his agents, servants, or employees, of any law, ordinance, or regulation of

any public authority or body, and all liens, claims of other liability for or on account of work, labor, materials, or supplies for the service and work contemplated under this agreement.

(d) The terms "expense" and "loss" as used in this section are intended and shall be construed to include attorneys' fees and costs, as well as all other expenses.

7. (a) During the first six months from and after May 1, 1934, and (unless the "alternate basis" hereinafter mentioned be substituted as in this section provided for) during the remainder of the first fourteen months of the continuance of this agreement, the Receivers will (subject to the provisions of Section 4 of this agreement) pay to the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading the coal, and in payment and reimbursement for all the other obligations, matters and things which the Contractor in and by the foregoing provisions of this agreement agrees to do and perform, a flat sum, as hereinafter specified, per ton of 2,000 pounds of such coal which is so mined, produced, and loaded on railroad cars by the Contractor, conforms to the said specifications and satisfactorily passes the inspection of the Receivers; provided, however, that said flat payment per ton shall be subject to adjustment upward or downward, depending upon the fluctuations in wages or unit prices over which the Contractor has no control, as hereinafter in this section set forth.

229 The flat sum per ton payable to the Contractor under this Section 7 (a) for the months of May and June 1934 shall be \$1.355 per ton, and shall not be subject to adjustment upward or downward for increases or decreases in labor or material prices, or otherwise, under the provisions of this Section 7 (a). The flat sum per ton so payable during the twelve months' period beginning July 1, 1934, and ending June 30, 1935, as provided in the paragraph next preceding, shall be based upon and in accordance with the number of tons of 2,000 pounds which are so mined, produced, and loaded on railroad cars by the Contractor, and shall be the applicable sum per ton enumerated under the following schedule:

	Per ton
(i) If not less than 180,000 tons and not more than 191,999 tons are loaded on cars the sum so payable per ton for the total tonnage shipped shall be.....	\$1. 355
(ii) If not less than 192,000 tons and not more than 203,999 tons are loaded on cars the sum per ton so payable for the total tonnage shipped shall be.....	1. 345
(iii) If not less than 204,000 tons and not more than 215,999 tons are loaded on cars the sum per ton so payable for the total tonnage shipped shall be.....	1. 335

	Per ton
(iv) If not less than 216,000 tons and not more than 227,999 tons are loaded on cars the sum per ton so payable for the total tonnage shipped shall be.....	1.325
(v) If not less than 228,000 tons and not more than 239,999 tons are loaded on cars the sum per ton so payable for the total tonnage shipped shall be.....	1.315
(vi) If not less than 240,000 tons are loaded on cars the sum per ton so payable for the total tonnage shipped shall be.....	1.305

To the extent the Contractor's costs per ton are increased by increases in the elements of cost as set forth in Exhibit B, attached as a part hereof, over which the Contractor has no control, then to that extent the flat sum per ton shall be adjusted upward. Such increased cost per ton shall be computed on the tonnage so produced and loaded on railroad cars during the contract year or for such shorter period as the flat rate per ton may be in effect. If the elements of cost per ton shown on said Exhibit B are reduced, said flat rate per ton shall be reduced to the extent of such reduction per ton.

230 The Contractor agrees to submit to the Receivers a schedule of rates of pay and salaries over which the Contractor has control and such rates shall not be put into effect, changed, or added to until written approval of the Receivers is first obtained.

(b) On and after November 1, 1934, the Receivers may, upon fifteen (15) days' previous written notice given by them to the Contractor, and subject to the provisions of Section 4 of this agreement, elect to accept and adopt in lieu of the flat rate per ton basis of payment provided for in subsection (a) of this section, the following basic cost payment plan, herein referred to as the "alternate basis." The payment per ton to the Contractor under the "alternate basis" shall be the aggregate of: (i) Actual cost per ton to the Contractor of extracting, mining, manufacturing, transporting, and loading the coal on railroad cars as in this agreement provided; (ii) Contractor's compensation of 10¢ per ton; provided, however, that should the cost per ton as ascertained above under this paragraph (b) be less than the cost would have been if the cost per ton had been ascertained under the provisions of paragraph (a) of this Section 7 (without adjustment upward or downward for increases or decreases in wages or other elements of cost as provided in Exhibit B hereof) then one-half of such difference shall be payable to the Contractor by the Receivers in addition to the amounts per ton enumerated above in items (i) and (ii) of this paragraph (b). Costs shall be computed under this subsection on the tonnage mined, produced, and loaded on railroad cars during the remainder of the contract period or year during which the provisions of this sub-

section shall apply and on the basis of each contract year thereafter, or of such shorter period if this agreement be terminated prior to the expiration of any contract period or year. Costs of extracting, mining, manufacturing, transporting, and loading cars shall not include any costs of additions, betterments, improvements, or developments to the plant used by the Contractor which are properly chargeable to capital account. After 231 the provisions of this subsection become effective the Contractor agrees to keep all of his expenditures on a relatively normal basis and not to voluntarily increase any of the costs over which he has control without first obtaining the written approval of the Receivers. In the ascertainment of costs under this subsection such costs will be based solely on cash outlays made by the Contractor.

In any computation of costs on the "alternate basis," such costs shall not include any costs to the Contractor referable to commissary, housing of employees, welfare work or any other costs not incurred in the actual extraction, mining, transporting, and the loading on cars of the coal. The Contractor shall have the right to sell for account of the Receivers such of the coal produced by him hereunder as may be necessary to supply the domestic requirements of his employees engaged in the service and work contracted for by him under this agreement. Such coal shall be so sold at the applicable Code price, or, if no Code price be applicable, at the prevailing price for coal so sold in the same field. Payments due for coal so sold shall be collected by the Contractor and the difference between the selling price and the cost to the Contractor of producing and so selling such coal shall be applied or credited against the Contractor's cost of coal produced and loaded under this agreement. A complete record of all such sales shall be kept by the Contractor. If any of the staff or employees of the Contractor are used by the Contractor in connection with any of his enterprises or undertakings other than the mining and production of coal and loading it on cars under and for the purposes of this agreement, then the salaries or wages shall be divided on a prorata time basis and the cost of extracting, mining, manufacturing, transporting, and loading coal hereunder charged only with the proper proportion referable thereto.

(c) In making payments to the Contractor in respect of coal extracted, mined, manufactured, transported, and loaded under this agreement, the actual weights ascertained by the initial carrier will govern and will be accepted by the parties hereto, except, however, that the Contractor agrees to refund to 232 the Receivers any excess freight charges due to the Contractor's failure to load cars for shipment to the Receivers

with the quantity of coal specified by the governing freight tariffs as carload minimum.

(d) The Contractor will issue on the last day of each month invoice covering all coal loaded by the Contractor under this agreement during that month, showing thereon the number and initials and the total weight of each car, and the net weight of the coal loaded therein. The Receivers will pay the Contractor in respect of all coal extracted, mined, transported, and loaded during each month, not later than the twentieth day of the succeeding month, provided the invoices of the Contractor are received not later than the fifth day of the succeeding month. As long as the flat-sum basis provided for in paragraph (a) of this Section 7 is in effect the sum per ton to be billed by the Contractor shall be \$1.325 per ton, adjustment to be made at the end of the contract year based upon the rate per ton in effect during such contract year which rate is dependent upon the number of tons shipped as provided for in said paragraph (a).

(e) In making payments in respect of coal extracted, mined, manufactured, transported, and loaded by the Contractor under this agreement, the Receivers shall have the right to offset and deduct the amount of any and all claims and or indebtedness of the Receivers against the Contractor, whether arising out of this or any other contract or transaction.

(f) The payment by the Receivers to the Contractor of the flat sum per ton provided for in Section 7 (a) of this agreement (as such sum may be adjusted pursuant to the provisions of this agreement) or payment made by the Receivers to him under and pursuant to the aforesaid "alternate plan" of payment (if and when adopted by the parties hereto pursuant to the provisions of this agreement and in such event from and after the effective date of such "alternate plan"), shall be in full settlement, satisfaction, and discharge of and for all the service and work and all the other obligations, matters, and things, which the Contractor in and by this agreement agrees or undertakes to do and perform, or cause to be done and performed, and in full payment, satisfaction, and discharge of all claims, demands, or causes of action of every sort, character, or description of the Contractor under or by virtue of this agreement.

(g) If at any time before the completion of and final settlement with the Contractor for the service, work, matters, or things herein agreed by him to be done or performed, the Receivers shall become subject to or receive notice of any claims or liens for work done or materials or supplies furnished for or on account of said service, work, matters, or things and/or any loss, liability, cost, and expense which the Contractor assumes hereunder and, or in-

dennifies the Receivers against, or if the Contractor is at any time in default in making payments to any subcontractors, laborers, materialmen, or others in connection with said service, work, matters, or things, then the Receivers may, at any time, withhold from all payments due or to become due the Contractor from the Receivers, whether growing out of said service, work, matters, or things, or otherwise, such amount as may, in the opinion of the Receivers, be necessary to reimburse or indemnify the Receivers against all such claims, liens, loss, liability, cost, and expense, whether the same shall or shall not have been definitely liquidated or ascertained, or be in dispute or litigation, and may apply the amount so withheld, or so much thereof as may be necessary, in reimbursing and indemnifying the Receivers.

8. The Contractor agrees to spend within a reasonably prompt time after the date of this agreement, not less than \$25,000 for additions, betterments, and improvements to the facilities necessary in the mining, production, and loading on railroad cars of coal under this agreement, no portion of the initial cost of which will be chargeable against the cost of extracting, mining, manufacturing, transporting, and loading on railroad cars of the coal but will be chargeable to capital account or development cost on the Contractor's books. The Contractor will furnish promptly to the Receivers a schedule of the character of such proposed expenditures and estimated cost thereof. If this agreement 234 is not renewed or extended for a period of one year or more beyond July 1, 1935, then the Receivers agree to pay the Contractor on July 1, 1935, a sum not to exceed \$5,000, this amount to be reduced to the extent the Contractor's compensation under this agreement exceeds \$20,000. Should the Contractor's compensation hereunder amount to \$25,000 or more then no sum will be payable by the Receivers under this section. If the Contractor expends less than \$25,000 then said \$5,000 will be reduced to the extent of such recess expenditure.

9. The Receivers, or their authorized representatives, shall be given full access to the property, records, and accounts of the Contractor at all times for the purpose of enabling them to ascertain the Contractor's costs, and the Contractor agrees that he will cause his records and accounts to be kept up to date and in an efficient way that will readily enable the Receivers to ascertain such costs.

10. The Receivers shall have the right to keep an accountant and or inspector at the mine at their expense, and the Contractor agrees to provide suitable working quarters.

11. This agreement shall, at the option of the Receivers, be renewed and extended from year to year, not exceeding an ag-

gregate period of four (4) years, from and after June 30, 1935, upon the same terms and conditions as are herein contained, provided seventy-five (75) days' previous written notice of the intention of the Receivers to so renew or extend this agreement shall be given by the Receivers to the Contractor.

12. The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence, or omissions of the Contractor, his agents, servants, employees, or representatives.

13. Except as and in the events provided for in Section 16 of this agreement, the Contractor shall not assign, sublet, or transfer his rights or obligations under this contract, without
235 the previous written consent of the Receivers.

14. In case of a difference of opinion, or dispute, between the Receivers and the Contractor as to the interpretation of this agreement, or in any manner arising out of the operations conducted under it or because of it, no action at law or suit in Court shall be instituted until the award is had of a Board of Arbitration herein provided for, except to enforce said award which shall be final and conclusive between the parties to the same. Said Board shall be constituted as follows:

Within thirty days after the written notice given by either party to the other, each party shall appoint an arbitrator and the said two arbitrators shall, if necessary to a conclusion, have the power, and it shall be their duty within sixty days from their appointment, to appoint a third; and a decision of the majority of a Board so constituted shall be regarded as the decision of the Board; and, if within the said thirty days, either of the parties shall neglect, fail, or refuse to appoint an arbitrator as required, then the other may appoint an arbitrator to represent the delinquent party whose opinion shall be equally binding as if appointed by the delinquent party aforesaid; and in case of failure on the part of said Board of Arbitration or any of them to act within ninety days after the date of notice given as aforesaid, a new Board may, at the option of either party, be demanded and within thirty days after such demand in writing shall be constituted after the same manner and governed as provided for the first Board, and with the same power to decide; but no person so previously appointed as an arbitrator shall be reappointed to act on the same question.

15. The provisions of this agreement shall extend to and bind the Contractor, his heirs, assigns, and personal representatives, subject, however, to the provisions of Section 16 of this agree-

ment. Subject to any right to cancel or terminate this agreement as provided herein or given by law, the provisions of this agreement, so far as they are applicable to the Receivers, shall be binding upon them, and shall inure to the benefit of, the

Receivers (as Receivers of Seaboard Air Line Railway Com-
 236 pany, but not individually) and their successors, the Sea-
 board Air Line Railway Company and its successors, the
 railroad corporation which may, after the termination of the receivership of Seaboard Air Line Railway Company, control and operate the line of railroad and appurtenant physical properties, to the business of which the subject matter of this agreement relates, and the successors of such railroad corporation.

16. If at the expiration of one year after the date of this agreement the Contractor shall not be living or shall have become physically totally disabled, or after said one year shall die or become so disabled, the Contractor or, in the event of his death, his heirs, or personal representatives, and provided the Contractor, his heirs, or personal representatives, shall have previously complied fully with his covenants contained in Section 8 of this agreement, shall have the right to transfer, assign, and set over to a corporation to be formed by him, or by his heirs or personal representatives, as the case may be, all of the capital stock of which will be owned by him or them, all of the rights, privileges, obligations, duties, and liabilities of the Contractor, his heirs, or personal representatives, under or by virtue of this agreement and which shall exist, arise, or accrue hereunder on, from, and after the effective date of such transfer and assignment. The effective date of such transfer and assignment, in case of such death or disability occurring prior to said one year, shall be at the expiration of said year or thereafter if the Contractor, his heirs, or personal representatives, shall elect, and in the case of such disability occurring after said one year, shall be the date of the occurrence of such death or disability, or thereafter, as he or they shall elect, from and after such effective date, and subject to the terms, conditions, and provisions hereinafter in this section contained, the Contractor, his heirs, or personal representatives, shall be relieved and released of all obligations, duties, and/or liabilities of the Contractor, his heirs, or personal representatives, under or by virtue of this agreement, so existing, arising, or accrued: Provided, Always, that said right of transfer and assignment is
 237 subject to and conditioned upon the following terms,
 conditions, and provisions:

(a) That simultaneously with the execution and delivery of said transfer and assignment, said corporation will

execute and deliver appropriate instrument, in form approved by counsel for the Receivers, whereunder and whereby such corporation will expressly accept said transfer and assignment and expressly agree with the Receivers to carry out and perform all the covenants, agreements, duties, and obligations of the Contractor, his heirs, and personal representatives, existing or accrued, or to exist, arise, or accrue, under or by virtue of the terms and provisions of this agreement, on, from, and after the effective date of such transfer and assignment and which the Contractor, his heirs, or personal representatives, would, in the absence of such transfer and assignment, be obligated hereunder to carry out and perform.

(b) That all matters and things in connection with the incorporation, charter powers, capitalization, and organization of such corporation, and the issue of its capital stock and/or all corporate or legal details, shall be subject to the previous approval of the Receivers' counsel; and such corporation shall have cash assets adequate to pay off and discharge all outstanding obligations assumed by it and with which to meet the normal operating costs and expenses which would have been incurred by the Contractor in the performance of his obligations under this contract had such transfer and assignment not been made.

(c) That such corporation shall not, without the previous written consent of the Receivers, create, incur or assume, or cause or permit to be created, incurred or assumed, any indebtedness or obligation except indebtedness or obligations of the Contractor and or his heirs or personal representatives, which such corporation shall, under or by virtue of said transfer and assignment to it and or said instrument of acceptance and assumption, necessarily assume, and except indebtedness or obligations necessarily incurred by such corporation for current operation and maintenance expenses in carrying out and performing, as such transferee and assignee, its covenants and obligations under or by virtue of this agreement, and except taxes or other obligations imposed by law upon such corporation or its properties and beyond its control.

(d) That the Contractor, his heirs or personal representatives, as the case may be, as and when requested by the Receivers, will deposit and pledge with the Receivers certificate or certificates, duly endorsed in blank for transfer, for all of the issued and outstanding capital stock of such corporation, except qualifying Directors' shares, and certificates for such shares so endorsed, if required by the Receivers, as and for security for the performance by such corporation of all of its covenants, agreements, and obligations, as such transferee and assignee, under or by virtue of

this agreement and/or the aforesaid instrument of acceptance and assumption of the duties, obligations, and/or liabilities of the Contractor, his heirs and personal representatives, hereunder, and which instrument is to be delivered by such corporation to the Receivers as hereinbefore provided, the certificate for all of such stock to be so deposited and pledged under appropriate instrument of deposit and pledge thereof in form approved by counsel for the Receivers and under which said stock will be validly and effectually pledged as and for such security; and

(e) That, prior to or simultaneously with such transfer and assignment to such corporation, there shall be delivered to the Receivers appropriate instrument, in form approved by their counsel, of consent of the Landowner to such transfer and assignment and consent or grant by the Landowner to such corporation of the right to use and employ, during the remainder of the period of this agreement or any extension or renewal thereof, in the performance of the terms, provisions, and conditions of this agreement by such corporation, the said mine and premises and the said building, tipples, structures, equipment, machinery, appliances, and appurtenances.

17. This agreement is made and entered into by the parties hereto in anticipation that the Landowner will acquire good title to and the right to grant, and will grant, to the Receivers the right to take from the said mine during the period from

May 1, 1934, to July 1, 1935, the quantity of coal which
239 the Contractor herein agrees to extract, mine, manufacture, transport, and load, and will acquire good title to, and the right to grant, and will grant, to the Contractor the right to use and employ in so extracting, mining, transporting, and loading said coal, all the buildings and other structures and all the equipment, machinery, facilities, and appurtenances now located on the premises and necessary, useful, or convenient in the operation of said mine. It is expressly agreed that the rights and obligations of the Receivers and of the Contractor, respectively, under or by virtue of this agreement are subject to and conditioned upon (a) a valid and effectual grant being made to the Receivers by the Landowner of the right to take or extract said coal from said mine and to contract with the Contractor for the service and work of extracting, mining, manufacturing, transporting, and loading said coal, as hereinbefore set forth, and under agreement granting such rights between the Receivers and the Landowner and containing terms and provisions satisfactory to the Receivers, and (b) a valid and effectual grant by the Landowner to the Contractor of the right to use and employ in so extracting, mining, transporting, and loading said coal, said

buildings, structures, equipment, machinery, facilities, and appurtenances.

In testimony whereof, witness the signatures and seals of the parties hereto as of the day and year first above written.

(s) LEGH R. POWELL, JR., [SEAL]

(s) HENRY W. ANDERSON, [SEAL]

As Receivers of Seaboard Air Line Railway Company.

Signed, sealed, and delivered, as to L. R. Powell, Jr., as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) BUFORD C. TYNES.

(s) R. E. DUNN.

(s) DANIEL H. PRITCHARD, [SEAL]

240 Signed, sealed, and delivered, as to Daniel H. Pritchard, in the presence of:

(s) BUFORD C. TYNES.

(s) R. E. DUNN.

Signed, sealed, and delivered, as to Henry W. Anderson, as Receiver of Seaboard Air Line Railway Company, in the presence of:

(s) M. E. CARROLL.

(s) G. M. BISHOP.

241 SEABOARD AIR LINE RAILWAY COMPANY

L. R. POWELL, JR., and HENRY W. ANDERSON, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

6 Inch Mine Run Coal:

6 inch Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 7 percent ash and not more than 40 percent of screenings which will pass through a screen having one inch openings between the bars. All large lumps to be broken down not to exceed 6 inches in size.

Railroad Screened Coal:

6 Inch Railroad Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than ----- inches in the clear between the bars; or a round hole shaker screen with openings not less than 6 inches in diameter. It must be of a clean and good steaming character containing not

more than 7 percent ash and not more than 40 percent of screenings which will pass through a screen having one inch openings between the bars.

Washed ----- Inch Railroad Steam Coal:

Washed ----- Inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a ----- inch round hole shaker screen with openings not less than ----- inches in diameter, then over a round hole shaker screen with openings not less than ----- inches in diameter.

All coal passing through the ----- inch bar or ----- inch round hole shaker screen and over the ----- inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or
242 over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump coal and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Run of Mine Railroad Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a ----- inch round hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the ----- inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately ----- percent washed coal to ----- percent hand picked lump and shall contain not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

Washed Steam Coal Screened and Rescreened:

Washed ----- inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the

bars not less than _____ inches in the clear, or through a round hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____ inch bar or _____ inch round hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed and shall contain not more than _____ percent of screenings which will pass
243 through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____ percent ash.

C. S. PATTON,

General Superintendent Motive Power.

NORFOLK, VA., *February 14th, 1933.*

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Exhibit B

(1) Where increases only are referred to herein it is understood that the same relative effect will be given to decreases. No adjustment shall be made for increases or decreases unless the increase or decrease, as the case may be, amounts to at least two cents per ton, for the aggregate of all items enumerated on this Exhibit B, for each contract year or portion thereof that the flat rate per ton is in effect if such rate is in effect for a period less than a full contract year. No increases or decreases are to be allowed in respect of additions, betterments, improvements, or development costs properly chargeable to capital account.

(2) Increases in wages will be allowed over those in effect, pending or proposed at the effective date of the agreement of which this Exhibit is a part insofar as wages over which the Contractor has no control are concerned; also all increases in compensation insurance due to increases in rates over the rate effective July 1, 1934. No increases will be allowed in respect of wages, rates of pay or salaries under the control of the Contractor unless specifically agreed to in writing by the Receivers prior to such increase being made effective by the Contractor.

(3) Other elements of costs enumerated below will be based on increases over the average prices of each element paid by the Contractor during the three months period following the effective date of said agreement, provided, however, if in the opinion of the Receivers or the Contractor, such prices are not representative, or no purchases have been made during such period, then the prices obtaining as of the date of said agreement will be ascertained by the Receivers' Purchasing Agent from authori-

tative sources and such prices so ascertained will be used as a basis for determining increased or decreased costs of such elements of cost, viz:

	Ties and props.	Mining machines and parts.
	Rails and track fastenings.	Electrical trolley wire and bondings.
	Explosives.	Tipple parts.
245	Motors and parts.	Mules & feed.
	Mine cars and parts.	Shovels, picks, drills, jacks and lubricants.
	Fans and parts.	
	Pumps and parts.	

NOTE.—Items costing less than \$10 each shall be disregarded unless purchased in volume at one time the aggregate cost of which is in excess of \$10, that is to say, that invoices of \$10 or less will be disregarded in order to save refinement in accounting.

(4) Increases in taxes due to increases in rates of levy or to new taxes lawfully imposed, payable by the Contractor under the agreement of which this Exhibit is a part, or, or in respect of, property or rights (other than on the land) acquired, or to be acquired, by the Receivers of Seaboard Air Line Railway Company, under agreement (referred to in said first-mentioned agreement) with United Thacker Coal Company and Cole & Crane Real Estate Trust, and on, or in respect of, property owned or used by, or rights or privileges of, the Contractor in mining, producing and loading coal under this agreement, will be allowed in computing increased costs to the extent such rates of levy exceed those in effect in 1934.

(5) Increases in the basic scale of power rates will be allowed, but changes in power costs due to the volume of power used shall not be allowed.

246 I hereby certify that the foregoing is a true and correct copy of agreement No. 23782 dated May 1, 1934, as executed between Leigh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company and Daniel H. Pritchard, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Leigh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN.

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

NORFOLK, VA., May 25, 1937.

MR. DANIEL H. PRITCHARD,

P. O. Box 405, Charleston, W. Va.

DEAR MR. PRITCHARD: Referring to your letter-offers to us, and our acceptance thereof, dated April 28, 1937, in respect of the extension and renewal on the basis therein set forth of your agreements to perform for us the work and service therein mentioned at the "William-Ann" and "Chilton Block No. 1" mines, respectively.

It is understood the undersigned will accept membership in the Code as and when promulgated under the Bituminous Coal Act of 1937 and will, as and to the extent of their liability for the excise tax of one cent per ton levied under Section 3 (a) of said Act and for the assessment levied under Section 4 (b) of said Act, pay said taxes and assessments referable to coal produced at said mines, respectively.

It is further understood that in arriving at the flat sum compensation to you stated in said letter-offers of \$1.687 per ton in the "William-Ann" mine case, and \$1.667 per ton in the "Chilton Block No. 1" mine case, the sum of three mills per ton, the estimated maximum amount of said Section 4 (b) assessments, was not included and that in the event the actual amount of said Section 4 (b) assessments paid by the undersigned shall, during the period of the continuance of your agreement with us, average less than three mills per ton, the compensation per ton payable to you by the undersigned under said agreements, respectively, shall be adjusted upward to the extent of the difference between the amount per ton of such average payment by the undersigned and three mills per ton.

It is further understood that in the event you, instead of the undersigned, should be legally required to pay the excise tax of one cent per ton levied under Section 3 (a) of said Act and/or any assessments levied under Section 4 (b) of said Act, not previously paid by the undersigned and referable to coal produced at said mines, or either thereof, for the undersigned under our existing agreement with you, any and all such taxes and assessments paid by you shall constitute increased elements of cost and, to the extent of such payments by you, the flat sum per ton compensation currently payable to you under said agreements, respectively, shall, subject to and in conformity with the provi-

sions of Exhibit B attached as a part of your existing agreement with us, be adjusted upward.

Yours very truly,

LEGH R. POWELL, JR. and

HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company,

By (S) LEGH R. POWELL, JR.,

Receiver.

The understandings above set forth are hereby accepted and agreed to by the undersigned, this 27th day of May 1937.

(S) DANIEL H. PRITCHARD.

248 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363-Sup. dated May 25, 1937, as executed between Daniel H. Pritchard and Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

249 *Comptroller's Contract No. 24363-B*

CHARLESTON, W. VA., April 28, 1937.

TO MESSRS. LEGH R. POWELL, JR. and HENRY W. ANDERSON,
as Receivers of Seaboard Air Line Railway Company,
Norfolk, Virginia.

GENTLEMEN: This letter will confirm the understanding of the undersigned, reached with you today, as follows:

1. That the term or period of the existing agreement of the undersigned with you, as Receivers of Seaboard Air Line Railway Company (evidenced by letter-offer of the undersigned dated July 5, 1935, and your acceptance thereof dated July 9, 1935), as said agreement has heretofore been extended, modified, supplemented, and amended, providing for the performance by the

undersigned of the work and service of extracting, mining, manufacturing, transporting, and loading on railroad cars at the mine tipple for you, as such Receivers, the coal therein mentioned at what is known as the "Chilton Block No. 1" Mine, in Logan County, West Virginia, is hereby further extended from and after August 31, 1937, to and until September 1, 1938, upon and subject to all the terms and conditions contained in said existing agreement, except as, and to the extent, said terms, provisions, and conditions are, pursuant to said understandings and as hereinafter set forth, further modified and amended, as follows:

2. That during the period on and after May 2, 1937, to and until September 1, 1938, the aggregate minimum quantity of coal which you shall be obligated under said existing agreement to direct the undersigned to mine, load, and ship for your account, and which the undersigned shall so mine, load, and ship, shall be 6,876 tons per month, and the aggregate maximum quantity shall be 11,458 tons per month, in such monthly quantities in excess of 6,876 tons as you, as such Receivers, shall currently direct.

3. That during the period on and after May 2, 1937, to September 1, 1938 (unless the "alternate basis" provided for in said existing agreement be substituted), you will pay to the undersigned for all work and service which the undersigned, in and by said agreement, agrees to do and perform, and in payment and in reimbursement for all the other obligations, matters, and things which the undersigned in and by said agreement agrees to do and perform, the flat sum of \$1.667 per ton of 2,000 pounds of coal which, on and after May 2, 1937, and during the period of the continuance of this agreement, is mined, produced, and loaded on railroad cars at said mine for your account, conforms to the specifications of said coal (as said specifications are modified as hereinafter set forth) and satisfactorily passes your inspection.

250 It is understood that said flat sum of \$1.667 per ton includes \$1.37 per ton which the undersigned claims represents the average cost per ton of coal to the undersigned of the work and service performed by the undersigned under said agreement during the period from July 1936, to March 1937, inclusive; that said represented average cost per ton is subject to check and verification by your accounting representatives and that in the event and to the extent such represented average cost per ton figure exceeds the actual cost per ton to the undersigned of such work and service during such period, the said flat sum of \$1.667 per ton is to be reduced accordingly, but that no adjust-

ment upward of such average cost figure per ton shall be made.

It is also understood that said flat sum of \$1.667 per ton includes the following amounts, aggregating \$0.205 per ton, as representing the increases which the undersigned claims have occurred in the respective below-stated elements of cost, viz:

4c per ton, the amount of Social Security taxes referable to coal extracted, mined, manufactured, transported, and loaded by the undersigned for you under said agreement and assessable under existing laws;

14c per ton, account increase in wages effective on and after April 1, 1937, over which the undersigned has no control; and

2½c per ton, account of increased cost to the undersigned of materials and supplies.

It is further understood that said specified elements of increased cost are subject to check and verification by your accounting representatives; that in the event and to the extent that the aggregate net actual increase in such elements of cost exceeds \$0.205 per ton, that said flat sum of \$1.667 per ton shall be increased accordingly, and that to the extent the aggregate net actual increase in such elements of cost is less than \$0.205 per ton, said flat sum of \$1.667 per ton shall be reduced accordingly.

It is further understood that effective on and after the time as of which the adjustments hereinafter in this paragraph 3 provided for in said flat price of \$1.667 per ton shall have been made, to the extent the undersigned's costs per ton are thereafter increased by increases in the elements of cost as set forth in Exhibit B attached as a part of said existing agreement over which the undersigned has no control, then to that extent the flat sum per ton compensation currently payable to the undersigned under said agreement shall, subject to and in conformity with the provisions of said Exhibit B, be adjusted upward. Such increased cost per ton shall be computed on the tonnage so produced and loaded on railroad cars during the contract period, or for such shorter period as the flat rate per ton may be in effect. If after such time the elements of cost per ton shown on said Exhibit B are reduced, the flat rate per ton currently payable to the undersigned under said agreement shall be reduced to the extent of such reduction per ton.

251 4. It is further understood that if at any time on and after May 2, 1937, and during the remainder of the continuance of said agreement, you shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to

you at a total cost per ton to you of less than the amount per ton at the time payable by you to the undersigned under the provisions of said existing agreement, as further extended, modified, and amended as herein set forth (plus a rent or royalty of not more than ten cents per ton of 2,000 pounds of the coal which you are obligated to currently pay to or upon the order of the owner and lessor of said premises or properties) then being paid by you for coal mined and shipped to you by the undersigned under said agreement, you shall have the right, at your option, in such event and from time to time as often as such event shall happen, upon sixty days' previous notice given by you to the undersigned of such intention, to terminate said agreement (as so extended, modified, and amended as herein set forth) and said agreement shall, upon such notice being given by you, thereupon stand terminated, unless the undersigned shall, before the expiration of the said sixty days' notice, agree in writing with you to reduce the cost to you of the work and service to be performed by the undersigned under said agreement to an amount per ton which, after adding thereto the amount per ton so payable by you for said rent or royalty, shall be equal to or less than such total cost per ton to you to purchase such other coal.

5. It is further understood that on and after May 2, 1937, and during the continuance of said existing agreement and of any extension or renewal thereof herein provided for, the coal which the undersigned is obligated under said agreement to mine, load, and ship for you, shall be Crushed 6" Run of Mine Coal, which will comply with your modified specifications, effective on and after May 2, 1937, for such coal, a copy of which modified specifications is hereto attached, and that said modified specifications supersede, on and after May 2, 1937, the specifications which, prior to May 2, 1937, applied to coal mined, produced, manufactured, transported, and loaded for you under said existing agreement.

6. That said existing agreement (as further extended, modified, and amended as herein set forth) shall, at your option, be renewed and extended from year to year after August 31, 1938, not exceeding an aggregate period of two (2) years after August 31, 1938, upon the same terms and conditions thereof, upon seventy-five days' previous written notice by you to the undersigned of your election to so renew and extend the said agreement from and after August 31, 1938.

7. That the terms, provisions, and conditions of said existing agreement (as further extended, modified, and renewed as

252 herein set forth) shall continue in force and effect unaltered and unimpaired.

Yours very truly,

(s) DANIEL H. PRITCHARD.

The above-stated understandings are hereby confirmed and agreed to by the undersigned, this 28th day of April 1937.

LEGH R. POWELL, Jr.

and HENRY W. ANDERSON,

as Receivers of Seaboard Air Line Railway Company.

By (S) LEGH R. POWELL, Jr.,

Receiver.

253 D. R. PRITCHARD, CONTRACTOR (CHILTON MINE No. 1)

SEABOARD AIR LINE RAILWAY COMPANY

L. R. Powell, Jr., and Henry W. Anderson, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

6" Crushed Mine-Run Coal:

Mine-run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 7-percent ash and not more than 35 percent of screenings which will pass through a screen having one-inch openings between the bars. All large lumps to be crushed down not to exceed 6 inches in size.

Screened Coal:

----- -Inch Screened coal shall consist of that portion of mine-run coal which will pass through a bar screen with openings not less than ----- inches in the clear between the bars, or a round-hole shaker screen with openings not less than ----- inches in diameter. It must be of a clean and good steaming character, containing not more than ----- -percent ash and not more than ----- percent of screenings which will pass through a screen having one-inch openings between the bars.

Washed ----- -Inch Steam Coal:

Washed ----- -inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than ----- inches in the clear, or through a ----- inch round-hole shaker screen with openings not less than -----

inches in diameter, then over a round-hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____-inch bar or _____-inch round-hole shaker screen and over the _____-inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____-inch round-hole shaker screen to be thoroughly washed in a jig-type washer or over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately _____-percent washed coal to _____-percent hand-picked lump coal and shall contain not more than _____ percent of screenings which will pass through a round-hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____-percent ash.

Washed Run-of-Mine Steam Coal:

Mine-run coal shall consist of the average unscreened product of the mine.

All coal passing over a _____-inch round-hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____-inch round-hole shaker screen to be thoroughly washed in a jig-type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately _____-percent washed coal to _____-percent hand-picked lump and shall contain not more than _____ percent of screenings which will pass through a round-hole screen having openings not less than one-inch in diameter.

Coal as delivered to car to contain not more than _____-percent ash.

Washed Steam Coal Screened and Rescreened:

Washed _____-inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than _____ inches in the clear, or through a round-hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____-inch bar or _____-inch round-hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The

coal then to be delivered to the railroad car evenly mixed and shall contain not more than ----- percent of screenings which will pass through a round-hole screen having openings not less than one-inch in diameter.

Coal as delivered to car to contain not more than -----percent ash.

E. H. ROY,

General Superintendent Motive Power.

NORFOLK, VA., May 20th, 1936.

254 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363 Sup., dated April 28, 1937, as executed between Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Daniel H. Pritchard, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

255 *Comptroller's Contract No. 24363 B*

NORFOLK, VA., June 30, 1936.

MR. DAN H. PRITCHARD,

P. O. Box 405, Charleston, W. Va.

DEAR SIR: Referring to that certain existing agreement (evidenced by your letter-offer dated July 5, 1935, and our acceptance thereof dated July 9, 1935), as heretofore extended, providing for the performance by you as an independent contractor of the work and service of extracting, mining, manufacturing, transporting, and loading on railroad cars for the Receivers the coal in, upon, or under the premises known as Chilton Block Coal Company No. 1 Mine properties, located in Logan County, West Virginia, as in said agreement provided and set forth.

The undersigned hereby offer to extend and renew said agreement for the initial period hereinafter in paragraph numbered 1 hereof stated, and with the right in the undersigned at their option to further extend and renew said agreement as in said

paragraph 1 set forth; such extension and renewal for said initial period and any such further extension or renewal by the undersigned to be upon the same terms and conditions as are contained in said agreement, with the following modifications thereof:

1. Said agreement, as herein modified, to continue during the period from and after June 30, 1936, to and inclusive of August 31, 1937, and to be renewable at the option of the undersigned from year to year after August 31, 1937, not exceeding an aggregate period of three years after August 31, 1937; upon the same terms and conditions (as same are herein modified), upon seventy-five days' previous written notice to you of the election of the undersigned to so renew and extend said agreement from and after August 31, 1937.

256 2. On and after July 1, 1936, you to extract, mine, and remove from said premises and properties, for use by the undersigned, not less than 5,938 tons of coal per month and not more than 9,896 tons per month in such monthly quantities in excess of 5,938 tons as the undersigned shall currently direct.

3. That during the period from and after June 30, 1936, to September 1, 1937, and of any extension or renewal herein provided for of said agreement (and unless the alternate basis provided for in said agreement be substituted) the undersigned will pay to you, for all work and service which you, in and by said agreement, agree to do and perform, and in payment and reimbursement for all other obligations, matters and things which you, in and by said agreement, agree to do and perform, the flat sum of One Dollar and Twenty-five Cents (\$1.25) per ton of 2,000 pounds of coal which is mined, produced, and loaded on railroad cars by you for the undersigned, conforms to the specification for said coal (as said specifications are herein offered to be modified) and satisfactorily passes the inspection of the undersigned; provided, however, that such flat sum per ton shall be subject to adjustment upward or downward, depending upon fluctuations in wages or unit prices over which you have no control, as in said agreement provided.

4. That if, after July 1, 1936, and during the remainder of the continuance of said agreement or of any extension or renewal thereof in and by this offer provided for, the undersigned shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to the undersigned at a total cost per ton to the undersigned of less than the amount per ton at the time payable to you by the undersigned under or by virtue of the provisions of said agreement, as herein offered to be modified (plus a rent or royalty of not more than ten cents (10c) per

ton of 2,000 pounds of the coal which the undersigned are obligated under the assignment or sublease to them of said premises and properties to currently pay to or upon the order of Dingess-

Rum Coal Company, the owner and lessor of said premises
 257 or properties) then being paid by the undersigned for coal mined and shipped for them by you under said agreement, the undersigned shall have the right, at their option, in such event and from time to time as often as such event shall happen, upon sixty (60) days' previous written notice given by the undersigned to you of such intention, to terminate said agreement, as herein offered to be modified, or any extension or renewal thereof herein provided for, and said agreement shall, upon such notice being given to you, thereupon stand terminated, unless you shall, before the expiration of the said sixty days' notice, agree in writing with the undersigned to reduce the cost to the undersigned of the work and service to be performed by you under said agreement to an amount equal to or less than such total cost to the undersigned to purchase such other coal.

5. That on and after July 1, 1936, and during the continuance of said agreement with you, as herein extended and modified, and of any extension or renewal thereof herein provided for, the coal which you, as such Contractor, shall be obligated under said agreement to mine, produce, manufacture, transport, and load for the undersigned, shall be 6" Resultant Coal which will comply with the modified specifications of the undersigned for such coal, a copy of which modified specifications is hereto attached as a part of this offer, upon the condition that upon your acceptance of this offer, said modified specifications shall, on and after July 1, 1936, supersede the specifications referred to in paragraph numbered 1 of your letter-offer, dated July 5, 1935, and which last-mentioned specifications, until July 1, 1936, constitute a part of your said existing agreement with the undersigned.

6. That the terms, provisions, and conditions of said agreement, as herein offered to be extended and renewed, shall, subject to the foregoing modifications and provisions, continue in full force and effect unaltered and unimpaired, during the period from and after June 30, 1936, and until September 1, 1937, and during the
 258 period or periods of any extensions or renewals thereof herein provided for and for which the undersigned may elect to extend and renew said agreement.

If, as we understand, the foregoing offer of the undersigned is acceptable to you, will you please endorse your acceptance of such offer on the enclosed counterpart hereof and return such counterpart, so endorsed, to the undersigned; such acceptance by

you to constitute the agreement of the undersigned with you in respect of the subject matters hereof.

Yours very truly,

(s) LEGH R. POWELL, JR.,

(s) HENRY W. ANDERSON,

As Receivers of Seaboard Air Line Railway Company.

The foregoing offer of the Receivers of Seaboard Air Line Railway Company is hereby accepted by the undersigned, this 30th day of June 1936.

(s) DAN H. PRITCHARD.

259 D. H. PRITCHARD, CONTRACTOR CHILTON BLOCK No. 1
MINE

SEABOARD AIR LINE RAILWAY COMPANY

L. R. POWELL, JR. and HENRY W. ANDERSON, Receivers

SPECIFICATIONS FOR LOCOMOTIVE STEAM COAL

Number 65 Revised

Mine Run Coal:

Mine run coal shall consist of the average unscreened product of the mine and shall be of a clean and good steaming character containing not more than 3 percent ash and not more than 3 percent of screenings which will pass through a screen having one inch openings between the bars.

Screened Coal:

6 Inch Screened coal shall consist of that portion of mine run coal which will pass through a bar screen with openings not less than 3 inches in the clear between the bars, or a round hole shaker screen with openings not less than 6 inches in diameter. It must be of a clean and good steaming character containing not more than 7.00 percent ash and not more than 35 percent of screenings which will pass through a screen having one-inch openings between the bars.

Washed _____ Inch Steam Coal:

Washed _____ Inch Steam coal shall, as it comes from the mine, be first screened through a bar screen with openings between the bars not less than _____ inches in the clear, or through a _____ inch round hole shaker screen with openings not less than _____ inches in diameter, then over a round hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____ inch bar or _____ inch round hole shaker screen and over the _____ inch shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____ inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad cars evenly mixed with the lump coal and in proportion of approximately _____ percent washed coal to _____ percent hand picked lump coal and shall contain not more than _____ percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____ percent ash.

Washed Run of Mine Steam Coal:

Mine run coal shall consist of the average unscreened product of the mine.

All coal passing over a _____ inch round hole shaker screen to be carried over a picking belt or table and all slate removed; this belt or table to be so designed and operated as to permit the ready removal of all impurities from the lump coal.

All coal passing through the _____ inch round hole shaker screen to be thoroughly washed in a jig type washer or over vibrating tables. The washed coal to be then delivered to the railroad car evenly mixed with the lump coal and in proportion of approximately _____ percent washed coal to _____ percent hand picked lump and shall contain not more than _____ percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than _____ percent ash.

Washed Steam Coal Screened and Rescreened:

Washed _____ inch steam coal shall, as it comes from the mines, be first screened through a bar screen with openings between the bars not less than _____ inches in the clear, or through a round hole shaker screen with openings not less than _____ inches in diameter.

All coal passing through the _____ inch bar or _____ inch round hole shaker screen to be separated by means of a bar or revolving screen, or both, into two or more sizes and then thoroughly washed in separate jigs or over vibrating tables. The coal then to be delivered to the railroad car evenly mixed and shall contain

not more than ----- percent of screenings which will pass through a round hole screen having openings not less than one inch in diameter.

Coal as delivered to car to contain not more than ----- percent ash.

E. H. ROY,

General Superintendent Motive Power.

NORFOLK, VA., May 20th, 1936.

260 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363 Sup. dated June 30, 1936, as executed between Legh R. Powell, Jr. and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company and Dan H. Pritchard, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr. and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITAIN,

*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

261 *Comptroller's Contract No. 24363-B*

NORFOLK, VA., July 5, 1935.

TO: MESSRS. LEGH R. POWELL, JR., and HENRY W. ANDERSON, as
*Receivers of Seaboard Air Line Railway Company, Care Mr.
J. L. Brown, their Purchasing Agent, Norfolk, Virginia.*

GENTLEMEN: The undersigned, Daniel H. Pritchard, of Charleston, W. Va., hereby submits to you the following offer of the undersigned:

(1) Subject to acquisition by you by assignment, sublease, or other instrument of transfer approved by your counsel (and at a total aggregate cost to you in rent or royalty, or otherwise, of not more than Ten Cents (10c) per ton of 2,000 pounds of the coal hereinafter mentioned), of the exclusive right and privilege of extracting, mining, manufacturing, and transporting through, over, and under the premises known as the Chilton Block Coal Company No. 1 Mine properties, located in Logan County, West Virginia, during the period from September 1, 1935, to Septem-

ber 1, 1936, or any extension or renewal of said period after September 1, 1936, and up to and including September 1, 1940, of an aggregate of not less than an average of 56,000 tons of coal, to be mined and shipped in substantially equal monthly quantities, during the year from September 1, 1935, to September 1, 1936, and during each year of such extension or renewal after September 1, 1936, the undersigned, as an independent contractor for you, at his sole expense, to extract said coal from said mine, mine, manufacture, and transport said coal and load same at the tippie on railroad cars ready for shipment by you; said coal to be extracted, mined, manufactured, and so transported and loaded by the undersigned to be 6" Mine Run coal, which will comply with your specifications for locomotive steam coal No. 65, a copy of which specifications is attached hereto as a part of this offer.

(2) You to pay the undersigned for the service and work of extracting, mining, manufacturing, transporting, and loading the coal, and in payment and in reimbursement for all the other obligations, matters, and things which the undersigned in and by or under the provisions of the agreement with the undersigned in paragraph 5 of this offer mentioned (and which agreement the undersigned proposes to make and enter into with you) would be obligated to do and perform, a flat sum of \$1.15 per ton of 2,000 pounds of such coal which is so mined, produced, and loaded on railroad cars by the undersigned; said flat sum per ton to be subject to adjustment upward or downward, depending upon fluctuations in wages or unit prices over which the undersigned has no control, as in said agreement mentioned in paragraph 5 of this offer to be provided, and with the alternate right in you, at your option, on and after March 1, 1936, to accept and adopt in lieu of said above-stated flat rate per ton basis of payment, the basic cost payment plan to be provided for in said agreement and to be therein referred to as the "alternate basis."

(3) The undersigned to purchase or otherwise acquire from the owner the right and privilege of using, and to use and employ, in the performance by him, for you of said work and service, all buildings, tipples, and other structures, and all equipment, machinery, appliances, and appurtenances located on said Chilton Block Coal Company mine properties, necessary or convenient for the extracting, mining, manufacturing, and transporting of said coal from the mine to the tippie and for loading the coal at the tippie on railroad cars ready for shipment by you.

(4) The undersigned, at his sole expense, to do and perform all repair or other work necessary or required in or about said mine properties, buildings, tipples, structures, equipment, ma-

chinery, appliances, and appurtenances, in order to put same in good and serviceable condition and to enable the undersigned to properly perform the work and service which the undersigned hereby offers to do and perform for you; said repair or other work in this paragraph 4 referred to to be fully completed on or before September 1, 1935.

263 (5) The undersigned, upon the acceptance by you of the foregoing offer, to forthwith make and enter into agreement with you embodying the terms and provisions of said offer, and, in conformity therewith, containing, and as applicable and relating to the work and service which the undersigned hereby offers to do and perform for you, the same terms, provisions, and conditions (including, in addition to all other of said terms, provisions, and conditions, provision for the adoption by you at your election, of the above-mentioned basic cost payment plan, to be therein referred to as the "alternate basis," and provision for renewal and extension of said agreement, at your option, from year to year, not exceeding an aggregate of four (4) years from and after August 31, 1936, upon the same terms and conditions, upon seventy-five (75) days' previous written notice by you to the undersigned of such intention by you), as are contained in the existing agreement dated May 1, 1934 (as now extended and renewed), between the undersigned and you providing for the performance by the undersigned for you of the work or service of extracting, mining, manufacturing, transporting, and loading on railroad cars, as an independent contractor for you, of coal from the premises known as the William-Ann Mine properties, located in Mingo County, West Virginia; provided, however, that in all cases where the terms, provisions, and conditions of said agreement dated May 1, 1934, conflict with or are inconsistent with the terms and provisions of this offer, the terms and provisions of this offer shall, in the making of the agreement which the undersigned in and by this paragraph 5 offers to make and enter into with you, govern, and control.

(6) The undersigned, in and by the agreement provided for in paragraph 5 hereof, (a) to also assume and agree to perform all the obligations, liabilities, and duties, in or in connection with the assignment and transfer to you of the right and privilege referred to in paragraph 1 hereof which shall, at any time, accrue, exist, or arise under or by virtue of the provisions of any agreement or instrument between you and the grantor
264 or transferor to you of said right and privilege, and whereunder you will acquire said right and privilege (except your obligation under such agreement or instrument to pay to such grantor or transferor a rental or royalty of Ten Cents (10¢) per ton, and or the minimum royalty, if any, provided for in

said agreement or instrument to be paid by you); (b) to at all times (except as to said rental or royalty payments) protect, indemnify, and save you harmless from and against, and/or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise; and (c) to also assume and pay, and protect, indemnify, and save you harmless from and against, all taxes, assessments, and levies, whether imposed or levied under or by virtue of any existing, or future enacted, National or state legislation, or by any Code or regulation or agreement by virtue of, or authorized or sanctioned by, or in conformity with, any such legislation, whether imposed or levied on or against you or the undersigned, or both you and the undersigned, and whether imposed or levied, in whole or in part, on or in respect of, the land, interest in land, property, rights, or privileges acquired by you under or by virtue of the assignment, lease, or other instrument of transfer referred to in paragraph 1 hereof, or acquired by you under or by virtue of the agreement of the undersigned with you provided for in paragraph 5 of this offer, or imposed or levied, in whole or in part, on or in respect of any property owned or used by the undersigned howsoever acquired, or property, or rights or privileges of the undersigned, acquired by the undersigned under or by virtue of the agreement provided for in paragraph 5 of this offer.

(7) The agreement mentioned in paragraph 5 hereof to also provide that if at any time after September 1, 1936 (should said agreement be renewed to extend beyond that date), and during the remainder of the continuance of the agreement provided for in paragraph 5 hereof, you shall be able to purchase in the same coal field other coal of a grade and quality satisfactory to you at a total cost per ton to you of less than the amount per ton at the time payable by you to the undersigned for said work and service,

plus rent or royalty referred to in paragraph 1 hereof, then
265 being paid by you for coal mined and shipped for you

by the undersigned under the agreement provided for in paragraph 5 hereof, you shall have the right, at your option, in such event and from time to time as often as such event shall happen, upon sixty (60) days' previous written notice given by you to the undersigned of such intention to terminate said agreement provided for in paragraph 5 hereof, and said agreement shall, upon such notice being given by you, thereupon stand terminated, unless the undersigned shall, before the expiration of the said sixty (60) days' notice, agree in writing with you to reduce the cost to you of the work and service to be performed by the undersigned for you under said agreement, to an amount equal to or less than such total cost to you to purchase such other coal.

In the event of your acceptance of the foregoing offer, upon and subject to the above-stated terms, conditions, and provisions, please endorse on the enclosed counterpart of this offer such acceptance by you, or in your behalf, and return such counterpart, so endorsed, to the undersigned.

Yours very truly,

(s) DANIEL H. PRITCHARD,
Charleston, W. Va.

The undersigned, as Receivers of Seaboard Air Line Railway Company, hereby on this 9th day of July 1935 accept the foregoing offer, upon and subject to the terms, provisions, and conditions therein set forth, subject to approval or ratification by the court of primary jurisdiction of the receivership court of Seaboard Air Line Railway Company.

(s) LEGH R. POWELL, JR.

(s) HENRY W. ANDERSON.

As Receivers of Seaboard Air Line Railway Company.

266 I hereby certify that the foregoing is a true and correct copy of agreement No. 24363, dated July 5, 1935, as executed between Daniel H. Pritchard and Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, an original counterpart of which agreement was introduced in evidence and identified by me as such at a hearing upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Co., for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937, held at Washington, D. C., before the National Bituminous Coal Commission, which said original counterpart is one of the permanent records of the said Receivers, entrusted to me and held in my possession as custodian of their contracts.

FRANK R. BRITTAIN,
*Custodian of Contracts for
Receivers of Seaboard Air Line Railway Co.*

267 National Bituminous Coal Commission, Washington, D. C.

Docket No. 49-FD

In the Matter of the Application of RECEIVERS OF SEABOARD AIR
LINE RAILWAY FOR EXEMPTION

Order on motion for extension of time to file brief

A motion having been made by the Solicitor for the Commission requesting an extension of ten (10) days in which to file a

reply brief in the above entitled matter, and it appearing to the Examiner that this extension of time is required for the purpose of permitting the Solicitor for the Commission to prepare a reply to an extensive brief filed by the Applicant.

It is ordered that the Solicitor for the Commission is hereby granted an extension of ten (10) days from this date within which to file a reply brief in this matter.

Dated this 8th day of November 1937.

(Sgd.) TILMAN B. CANTRELL.

Tilman B. Cantrell.

Examiner.

268 Before the National Bituminous Coal Commission

In the matter of the application of L. R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, for exemption from Section 4 of the Bituminous Coal Act of 1937. Docket No. 49-FD.

Brief and argument on behalf of applicants

Oct. 28, 1937

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LIST OF CASES CITED

Adonique v. Carmen: 151 Ky. 249, 151 S. W. 921.

Carbon Steel Co. v. Llewellyn: 251 U. S. 501, 40 S. Ct. 283, 64 L. Ed. 375.

Carter v. Carter Coal Company: 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.

C. J. Volume 14A Sec. 2178.

C. J. Volume 20, p. 128 n. 85.

Eubank v. Richmond: 226 U. S. 137, 143, 33 S. Ct. 76, 57 L. Ed. 156.

Galveston Causeway Construction Co. v. Galveston H. & S. A. Ry.: 284 F. 137, (Aff. C. C. A.) 287 F. 1021, cert. denied 262 U. S. 747, 43 S. Ct. 503, 67 L. Ed. 1212.

Grant, receiver v. A. B. Leach & Co.: 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470.

Heisler v. Thomas Colliery Company: 260 U. S. 245, 259, 260, 43 S. Ct. 83, 86, 67 L. Ed. 237.

Jacksonville, Mayport, Pablo R. & Nav. Co. v. Hooper, 160 U. S. 314, 16 S. Ct. 379, 40 L. Ed. 515.

Klepper v. Carter: 286 F. 370.

Oliver Iron Mining Company v. Lord: 262 U. S. 172-178, 43 S. Ct. 526-529, 67 L. Ed. 929.

Rauber v. Mutual Life Ins. Co. of N. Y.; 156 App. Div. 446, 141 N. Y. S. 997.

Rothschild v. Northern Pacific R. Co.; 68 Wash. 527, 123 Pac. 1011.

Schechter Poultry Corp. v. U. S.; 295 U. S. 495, 537, 55 S. Ct. 837, 79 L. Ed. 1570.

Union Bank v. Matthews; 98 U. S. 621, 25 L. Ed. 188.

Washington ex rel Seattle Trust Co. v. Roberge; 278 U. S. 116, 121, 122, 49 S. Ct. 50, 73 L. Ed. 210.

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STATEMENT OF CASE

This proceeding was instituted by petition, filed by Applicants on August 4, 1937, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937. Testimony in support of the application was heard by Examiner Cantrell of the Bituminous Coal Commission on September 22nd and 23rd, 1937.

Applicants acquired from the respective fee owners ownership of the coal in place at the following mines: the Glamorgan Mine, located in Wise County, Virginia, in 1934, from Glamorgan Coal Land Corporation; the William-Ann Mine, in Mingo County, West Virginia, in 1934, from United Thacker Coal Company and H. Langdon Laws, Albert H. Cole and Charles H. Stephens, Jr., as Trustees, under a real estate trust known as the "Cole & Crane Real Estate Trust"; and the Chilton Block No. 1 Mine, located in Logan County, West Virginia, in 1935, by assignment and transfer from Chilton Block Coal Company (lessee of Dingess-Rum Coal Company) by and with the consent of Dingess-Rum Coal Company, the fee owner. Each of these instruments of conveyance to Applicants contains provisions for renewal thereof and each was duly renewed and is now in effect.

At the time of their acquisition of the coal lands mentioned in the next preceding paragraph, Applicants entered into a contract with Glamorgan Coals, Incorporated (a separate and distinct corporation from Glamorgan Coal Land Corporation), the Receivers thereof, and later with Peerless Coal Corporation, as the respective successors in interest of Glamorgan Coals, Incorporated, by which these parties agreed to extract and load on railroad cars at the Glamorgan Mine Applicants' coal in that mine for an agreed compensation for the work and service performed for Applicants. Similar contracts were entered
271 into by Applicants with Daniel H. Pritchard for the extraction and loading at the mine of Applicants' coal at the William-Ann and Chilton Block No. 1 Mines. Each of these

contracts contains provision for renewal thereof, same were duly renewed and are in effect at the present time.

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ABSTRACT OF EVIDENCE

1. Applicants own all the coal for which they seek exemption.

Documentary proof:

Conveyances from the landowners to Applicants disclose that each is an absolute transfer of the title and exclusive right to mine and extract coal at each one of the properties herein involved, in consideration of the payment to or for account of the landowners, in each case, of the stipulated reserved royalty. These conveyances are designated and introduced into evidence as Exhibits 1, A1, 2, and 3 (R. p. 30), Exhibit 1B (R. p. 34).

The contracts between the Applicants and their operators disclose that the operators are working for and under the direction of the Applicants in the work of extracting and loading on railroad cars at the mine the Applicants' coal. The documents herein referred to were introduced in evidence and are referred to as Exhibits 4, 5, and 6 (R. p. 30).

Oral proof:

Testimony was given by the following witnesses, which was not contradicted, to the effect that the Applicants under the above-mentioned conveyances from the respective landowners acquired the exclusive ownership and the exclusive right to mine coal from each of the properties herein involved.

Mr. Plummer, Applicants' General Attorney (R. pp. 40, 41, 42, 45, 48, 54, and 55).

Mr. Tynes, Vice President and General Counsel, United Thacker Coal Company, fee owner of William-Ann Mine (R. pp. 120-121).

Mr. Kelly, Treasurer, Glamorgan Coal Land Corporation, fee owner of Glamorgan Mine (R. p. 152).

Mr. Pritchard, President, Chilton Block Coal Company, assignor with consent of Dingess-Rum Coal Company, the fee owner, of the Chilton Block No. 1 mine property (R. pp. 223-235).

2. Operators own or claim no title or interest in the coal.

Testimony was given by the following to the effect that none of the operators own or claim any interest in or title to any of the coal produced at the three mines.

Mr. Shunk, co-Receiver for Glamorgan Coals, Incorporated, former operator, and President of Peerless Coal Corporation, successor and present operator (R. pp. 159, 177, and 182)

Mr. Pritchard, operator, William-Ann and Chilton Block No. 1 Mines (R. pp. 232-243).

3. All coal produced (except negligible quantities sold to mine employees) is shipped by and to and is consumed by Applicants. Testimony of the following witnesses is to this effect:

Mr. Gaudin, Applicants' fuel representative (R. pp. 192-198).

Mr. Perry, of Applicants' Transportation Department (R. p. 214).

Mr. Shunk, co-Receiver of Glamorgan Coals, Incorporated, former operator, and President of Peerless Coal Corporation, operator, successor, and present operator (R. p. 182).

Mr. Pritchard, operator, William-Ann and Chilton Block No. 1 Mines (R. p. 237).

4. No sale of coal shipped to Applicants occurs.

Testimony of the following witnesses shows that no sale or other transfer of title to the coal shipped by and to Applicants takes place:

Mr. Gaudin (R. pp. 197-198).

Mr. Perry (R. p. 214).

Mr. Shunk (R. pp. 159, 163, 176, 177, 180, 182).

Mr. Pritchard (R. pp. 232, 237, and 243).

5. Applicants are the producers of the coal.

Testimony of the following witnesses is to the effect that the Applicants are producers of the coal at each of the three mines for which they are here seeking exemption:

Mr. Shunk (R. pp. 181-182).

Mr. Pritchard (R. pp. 241-243).

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QUESTIONS INVOLVED

1. Applicability of Section 4 of the Act:

(a) Intent and scope.

(b) Constitutionality.

2. Whether exemption by virtue of Section 4 (1) of the Act applies.

3. Effect of any acceptance by Applicants' operator of code membership.

4. Intervention of Bituminous Coal Producers Board for District No. 8.

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ARGUMENT

I

1. (a) The intent and scope of Section 4 of the Bituminous Coal Act of 1937

Section 4 of the Bituminous Coal Act of 1937 relates or applies only where the coal involved is sold or the title thereto is other-

wise transferred by the producer, and to transactions or commerce in such coal so sold or the title to which is so transferred.

Throughout the Bituminous Coal Act of 1937 there is unmistakable language evidencing the intent of Congress to regulate only those transactions and commerce in coal which involve a sale or other transfer of title to such coal by the producer between its removal from the ground and its consumption. The preamble (or Section 1) of the Act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct inter-state commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

The use of such expressions in the preamble (of Section 1) as "sale and distribution," "practices and methods of distribution and marketing," "regulation of the prices thereof" and "of unfair methods of competition therein" state the whole philosophy of Section 4 of the Act, which, Applicants submit, only concerns itself with commercial transactions or, stated otherwise, those transactions in which there is a transfer by the producer of title to his coal.

276 Other sections of the Act give abundant support to the conclusion reached that the intent and scope of Section 4 of the Act is limited as above stated.

In Section 2 (b) of the Act provision is made for the appointment of Consumers' Counsel, whose duties are relevant to those transactions only which contemplate a transfer of the title to coal in such manner that the general consumer is affected.

That such is the intent and scope of Section 4 of the Act is also made indisputably clear by the following provisions contained in Section 4 itself:

"Marketing."—The title of Part II; provision in subdivision (a) of this Part II for the report by Code members of "spot orders," for the filing by Code members of copies of all contracts "for the sale of coal," for proposals required to be made by the respective District Boards of minimum "prices free on board transportation facilities at the mines * * * so as to yield a return per net ton for each District in a minimum price area"; provision that the minimum "prices" so proposed shall reflect, as

nearly as possible, the relative "market value" of the various kinds, etc., of coal * * * and shall have due regard to the interest of the "consuming public"; provision that the weighted average of the total cost determined by the Commission and transmitted to the District Boards shall be taken as the basis for the proposal and establishment of minimum "prices"; provisions empowering the Commission to establish maximum "prices" for coal; the provisions in Section 4 (e) that no coal subject to the provisions of Section 4 shall be "sold or delivered or offered for sale" at a price below the minimum or above the maximum therefor established by the Commission, and the "sale or
 277 delivery or offer for sale of coal" at a price below such minimum or above such maximum shall constitute a violation of the Code; that the making of a contract for "the sale of coal at a price" below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the Code; that from and after the date of approval of the Act until "prices" shall have been established pursuant to subsections (a) and (b) of Part II of Section 4, no contract "for the sale of coal" shall be made providing for delivery for a period longer than thirty days from the date of the contract, and that no contract shall be made "for the sale of coal" for delivery after the expiration date of the Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract—All Point Clearly and Unmistakably to the Intent of Congress to Limit and Restrict the Application of the Provisions of Section 4 of the Act to Coal Which is Sold or the Title Thereto Otherwise Transferred by the Producer of the Coal and to Transactions and Commerce in Such Coal.

The enumerated practices with respect to coal, and which Section 4 (i) of the Act provides shall constitute violations of the Code, all, either in express terms or by clear implication, relate and apply only to practices in or incident to sales or other transfers of title to the coal by the producer, and are also indicative of the intent of Congress to so limit and restrict the application of Section 4 of the Act.

Summarized, Section 4 of the Act by the express terms thereof relates and applies only in cases where the coal is sold or the title thereto otherwise transferred by the producer of the coal,
 278 and to transactions and commerce in coal which involve the sale or other transfer of title to, the coal by the producer. The evidence adduced at the hearing is conclusive that (with the exception of the negligible quantity of so-called "house" or "tenement" coal sold to mine employees) no sale or other transfer of

the title by the producer to the coal produced at these mines occurs. Applicants introduced in evidence conveyances from the fee owners of each of these three mines. These conveyances show that several years prior to the enactment of the Bituminous Coal Act of 1937 title had vested in them (Exhibits 1, 2, and 3, R. pp. 23, 24, 30, 34), and while the contracts speak for themselves, the construction which the parties thereto placed upon them was testified to by Mr. Plummer, Applicants' General Attorney (R. pp. 40, 41, 42, 45, 48, 54, and 55), Mr. Tynes, Vice President and General Counsel of the United Thacker Coal Company, one of the fee owners of the William-Ann Mine (R. pp. 120, 121), Mr. J. J. Kelly, Treasurer of Glamorgan Coal Land Corporation, fee owner of the Glamorgan Mine (R. p. 152), and Mr. Daniel H. Pritchard, President of Chiltern Block Coal Company (R. pp. 233, 235), and the testimony of all supported the above stated purpose and intent of the conveyances to Applicants.

In addition to the showing of exclusive right, title, and interest in and to the coal at Applicants' mines, two witnesses of Applicants' staff, whose duty it was to handle such transactions, testified that all of the coal which is produced at the mines here involved and shipped by and to Applicants is consumed by them (Mr. Gardin, R. pp. 197, 198, and Mr. Perry, R. p. 214). Mr. Perry (R. p. 214) testified that none of the coal so shipped was sold by Applicants. Mr. Shunk, President of Peerless Coal Corporation, one of the Applicants' operators (R. pp. 159, 163, 176, 177, 180,

279, 182) and Mr. Pritchard, their other operator (R. pp. 232, 237, 243) testified that all (except the small quantity above mentioned) of the coal produced at these three mines is shipped to Applicants.

It follows that as a matter of law the provisions of Section 4 of the Act do not relate or apply to the coal shipped by and to Applicants from these mines and consumed by Applicants, or to their transactions and commerce in such coal. >

1. (b) If Section 4 relates or applies, or purports to relate or apply, to the coal produced at these mines which is shipped by or for account of Applicants to Applicants and consumed by Applicants, or to the transactions and commerce in such coal, said Section, if and to the extent so applied, is unconstitutional, void and unenforceable, as violative and in contravention of (i) the commerce clause of the Constitution of the United States, to wit: Article One, Section 8, Clause 3 thereof, and (ii) the due process clause of the Constitution of the United States, to wit: the Fifth Amendment thereof.

(i) The mining of coal is not interstate commerce.

In *Oliver Iron Co. v. Lord*, 262 U. S. 172 S. Ct. 526-9, 67 L. Ed. 929, the Supreme Court of the United States, on the authority of numerous cited cases, held:

"Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."

In *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260, 43 S. Ct. 83, 86, 67 L. Ed. 237, the Court held that the possibility or even certainty of exportation of a product or article from a state did not determine it to be in interstate commerce before the commencement of its movement from the state, and that to hold otherwise

"would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other States at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined because they are in varying percentages destined for and surely to be exported to states other than those of their production."

In the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160, the Court said:

"Extraction of the coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by the force of these activities, but by negotiations, agreements, and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it."

(ii) All of the coal produced at these mines is owned by Applicants and all (except the negligible quantity above mentioned) is shipped from the mines by Applicants to themselves and is consumed by Applicants. If in this state of facts the price fixing provisions of Section 4 of the Act relate or apply, or purport to relate or apply, to said coal, said provisions constitute the regulation by Congress of a purely local and private activity, which would deprive Applicants of their right to produce their own coal for their own exclusive consumption under their own contractual arrangements, and require that said coal so produced, could only be produced at a cost to Applicants determined and fixed by the Commission. Said price-fixing provisions, if applied to said coal,

would therefore deny to Applicants the rights safeguarded by, and be violative and in contravention of, the Fifth Amendment.

Carter v. Carter Coal Co., supra. See also *Schechter Poultry Corp. v. U. S.*, 295 U. S. 495, 537, 55 S. Ct. 837, 79 L. Ed. 1570; *Eubank v. Richmond*, 226 U. S. 137, 143, 33 S. Ct. 76, 57 L. Ed. 156; *Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121, 122, 49 S. Ct. 50, 73 L. Ed. 210.

In the facts and circumstances of this case, such price-fixing provisions, if so applied, would in effect govern and change the amount of the compensation payable by Applicants under the existing contractual arrangements for the work and service performed for Applicants of extracting, mining, and loading the coal and in that respect would, in principle and effect, regulate the compensation relations between Applicants and the operators performing for Applicants such work and service—a power which the United States Supreme Court in the *Carter* case, supra, in striking down the labor relations provisions of the Bituminous Coal Conservation Act of 1935, held Congress did not possess and could not, without violation of the commerce clause and the Fifth Amendment, exercise.

II

Issue 2.—Independent of the questions dealt with in the next preceding subdivision I of this brief, the coal produced at these mines and shipped by or for account of Applicants to Applicants and consumed by Applicants, and the transactions and commerce in such coal, is, by virtue of subdivision (1) of Section 4 of the Act, expressly exempted from the provisions of said Section 4

(a) Applicants are producers of the coal and, as such, entitled by virtue of Section 4 (1) of the Act to the exemption claimed by them.

Applicants submit that the term "producer," as used in Section 17 (c) of the Act, is not all-inclusive. This is evident from the language of Section 17 (c) itself, which is that

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

The use of the term "includes" in this Section 17 (c) obviously excludes a construction that the definition of "producer" in this Section is all-embracing.

The word "producer," as used in Section 4 (1) of the Act, is of broader signification and is employed therein having reference to all of the provisions of the Act. The Act applies to the two following general classes of coal:

(i) Coal owned in place and after its extraction consumed by the same owner thereof.

(ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3—the tax provisions of the Act. Applicants submit that coal exempted by virtue of Section 4 (1) of the Act includes coal of the first above-stated class which is produced either by the owner thereof personally or through agencies or instrumentalities employed by such owner. Coal produced personally by the owner in place or through such agencies or instrumentalities is covered by Section 3—the tax provisions of the Act. In view thereof, clearly the intent of Section 4 (1) is to include in the exemption such owned coal produced through such agencies or instrumentalities. Such intent must be imputed to Congress; otherwise the application and operation of this exemption provision would be highly unjust, unfair and discriminatory, in that it would grant the exemption only to coal which is consumed by the owner thereof in place and produced personally by such owner, and would deny the exemption to coal owned in place and consumed by one and the same owner but produced by him through employed agencies or instrumentalities. No sound or just reason for such distinction exists.

The coal shipped from these mines is all shipped by Applicants to Applicants and is consumed by Applicants. The operator has no title to or interest therein, uses or consumes none of this coal, has no right of disposition thereof and makes no disposition thereof. Mr. Gaudin (R. pp. 197, 198); Mr. Perry (R. p. 214); Mr. Shunk (R. pp. 159, 163, 176, 177, 180, 182); and Mr. Pritchard (R. pp. 232, 237, 243). Accordingly, should the Commission find that the operators and not Applicants are the producers of the coal at these three mines, the operator, who neither owns, sells, or otherwise transfers the title to the coal, does not consume it, has no power of disposition of and makes no disposition of the coal, would not be a "producer" within the meaning of Section 3 of the Act and would not be liable for the taxes imposed thereunder.

At the hearing some point was made that the work of mining and loading the coal was performed by others under contract with Applicants and that Applicants exercised little or no control over the detailed operations at the various mines, the inference being that Applicants do not occupy the status of "producers."

Such an inference is improper.

284 In this connection, the testimony of Mr. Shunk, President of Peerless Coal Corporation, as operator at the Glamorgan Mine (R. pp. 181, 182) shows that whether the operator be an

employee, an agent, or an independent contractor, he is extracting and mining coal which is the property of Applicants, that Applicants are the motivating agency of the production at each of these three mines:

"Mr. PLUMMER. Is it not a fact that those funds paid to the Peerless Coal Corporation weekly furnish you with the funds from which you compensate your miners and pay your other items of expense?"

"Mr. SHUNK. That's right. We pay, of course, all of our items of expense from the proceeds from the coal as received from the Seaboard.

"Mr. PLUMMER. The Peerless Coal Corporation produces no coal for anybody, any person nor any corporation——

"Mr. SHUNK. Nothing other than has been mentioned.

"Mr. PLUMMER. All coal produced at the Glamorgan Mine by the Peerless Coal Company is owned by the Seaboard Receivers, is it not?"

"Mr. SHUNK. That's right."

The contracts with the operators, in evidence, show that Applicants furnish all the directions to mine and provide the necessary funds to enable the operator to pay, or to reimburse him for, operating costs, taxes, and other expenses incurred by the operator incidental to the operation of these mines.

285 The distinction in relationship of an agent and an independent contractor is of no significance in determining the status of Applicants as producers, and is only of importance where the rights of third parties are involved. Should the Commission find that the contracts between Applicants and their operators establish that such operators are independent contractors, they must still find that under the following court decisions the relationship of agency exists as between Applicants and such operators:

In *Rothschild v. Northern Pacific R. Co.*, 68 Wash. 527, 123 Pac. 1011, the railroad delivered a car of freight to a transfer company, which had been employed by the plaintiff (consignee) to remove the contents of the car to his warehouse, the employees of the transfer company opened the doors of the freight car and before any unloading was done, the contents burst into flames and were destroyed. Plaintiff brought suit against the railroad company to recover the value of the destroyed merchandise. He asserted that the transfer company was an independent contractor, and that a delivery of the consignment to it did not bind him, as it was not his agent. The court found for the railroad company and used the following language:

"The Court found that the Holman Transfer Company, whom the plaintiff appointed to receive the property, was an independent

contractor, and it is argued that, because of this fact, the relation of principal and agent did not obtain between the plaintiff and the transfer company, and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. But we cannot accept this doctrine. It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant, and consequently notice to it was notice to the plaintiff."

In *Galveston C. Construction Co. v. Galveston H. & S. A. Ry. Co.*, 284 F. 137 (D. C. S. D. Tex.), affirmed 287 F. 1021 (C. C. A. 5th), certiorari denied 264 U. S. 747, 43 S. Ct. 503, 67 L. Ed. 1212, the facts were that the contractor agreed to build a causeway for a group of railroads. Contractor's compensation was fixed at a definite sum. He failed to complete the work for the contract price and the railroads finished it at a cost far in excess of the price agreed upon. Before the railroads could file suit to recover from the contractor and his surety, the two latter filed a bill in equity to have the contract set aside on the ground that it was inequitable. The bill was dismissed by the court. It appears also that the complainants endeavored to show that the contract did not make the contractor an independent contractor and he being an agent, his principals could not recover for the additional cost of the work. In this case the District Court said:

"I must advert briefly to the contention made so much of in complainants' brief that the contract did not make complainant an independent contractor, but merely an agent. Whether this is so or not it is unnecessary to decide, for there is no provision of law or of equity which prevents an agent from making an agreement to perform work upon a fixed compensation and upon a guaranteed cost."

It is apparent, therefore, that the contractual relationship between Applicants and their operators in no way militates against the contention that ownership of the coal and the shipment by and to them and their consumption thereof, are sufficient to bring them within the exempted class.

287 (b) Applicants are engaged in the business of mining coal at these three mines

Applicants are "engaged in the business of mining coal" at each of these three mines within the meaning and intent of Section

17 (c) of the Act. All of the coal produced at these mines is owned by Applicants, who have the sole right and power to order and direct production of the coal produced thereat. Notwithstanding the fact that Applicants do not themselves physically operate these mines and that such physical operation is through agents or instrumentalities employed by them to perform the mining operations, Applicants are, under the following decisions, producers of and engaged in the business of mining the coal at each of these three mines:

In *Adonigue v. Carmen*, 151 Ky. 249, 151 S. W. 921, the question was whether or not the defendant, a non-resident of Kentucky, was properly before the court. Subsection 6 of Section 51, Civil Code of Kentucky, provided that in actions against residents of other states engaged in business in Kentucky, service could be had upon the manager or agent of or person in charge of said business in Kentucky. Defendant employed the Fidelity Trust Company to take charge of her property, rent it and collect the rents as they fell due. The court held that the defendant was engaged in business within the state and that service upon the trust company was sufficient to bring her before the court.

In *Rauber v. Mutual Life Insurance Co. of N. Y.*, 141 N. Y. S. 997, action was brought on three life insurance policies. The applications contained warranties by the insured that he would not engage in the retailing of intoxicating liquors. The court decided that these warranties had been violated because the insured owned an interest in a retail liquor business, though he did not physically participate in the business.

In 20 C. J., p. 1258, n. 85 (*In re Ralph's Trade-Mark*, 25 Ch. D. 194, 198) is the following:

"It seems that a patentee is 'engaged in any business' so long as he receives royalties under his patent, even though he does not himself manufacture."

The case of *Carbon Steel Co. v. Llewellyn*, 251 U. S. 501, 40 S. Ct. 283, 64 L. Ed. 375, arose under the Munitions Tax Act. In it the court defined the expression "every person manufacturing." In this case, the Steel Company contended that it was not a person manufacturing. The facts were that the Steel Company had obtained contracts for the manufacture of shells from the British Government. Not having the equipment to make the complete shell, which involved nine operations, it worked the steel and delivered it, together with certain other parts it had purchased from others, to contractors, for completion. The Steel Company contended that it could only be held to be a person manufacturing, if it made the complete shell, and that because it furnished parts to others and that they did the manufacturing, it was not liable for the tax. The court, however, disregarded this contention and

held the Steel Company liable for the tax as "a person manufacturing." The language of the court, in which it discusses the meaning of the phrase involved, follows, and particular attention is called to its applicability as sustaining the contentions of Applicants in the instant case that they are producers of and
289 engaged in the business of mining the coal:

"How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a 'person manufacturing'? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself, and what he does through others as subsidiary to his obligation.

"It is, after all, but a question of the kind or degree of agency—the difference, to use counsel's words, between 'servants and general agents' and 'brokers, dealers, middlemen, or factors.' And this distinction between the agents counsel deems important, and expresses it another way, as follows: 'Every person manufacturing, means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked up does not alter this meaning of the word.'

"We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of course it did not contemplate that a 'person manufacturing' should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor, but it contemplated also the world's division of occupations; and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and when availed of for profits, the latter could not thereby escape being taxed."

In *Klepper v. Carter*, 286 F. 379 (C. C. A. 9th) the Court construed *Carbon Steel Co. v. Llewellyn*, supra, to be its authority for deciding that an automobile dealer, who purchased a truck chassis from one manufacturer and a body from another, and who sold the two as a completed truck, to be a producer of a motor truck. He was therefore held to be liable for the tax. The Court said:

"In our opinion Klepper was properly held to be a manufacturer or producer of automobile trucks. While he did not make any of the several parts nevertheless he bought the parts made by others and he sold a completed automobile truck.

"Thus he produced or manufactured a truck."

Clearly under the above cited decisions Applicants are
290 producers and engaged in the business of mining coal at

these mines, and as such are included in the term "producer," as defined in Section 17 (c) of the Act.

At the hearing some question was raised as to the charter power of Seaboard Air Line Railway Company and of Applicants as the Receivers thereof, to engage in the business of mining coal. This question cannot be properly raised in this proceeding.

It is well settled that the charter powers of a corporation cannot be collaterally attacked.

14A C. J. Sec. 2178—"A most important doctrine connected with the subject of the validity of corporate transactions * * * is that whether a corporation has acted without authority, or has acted in contravention of law, cannot be set up by individuals, *but can be set up only by the State in a direct proceeding for that purpose* * * * [Italics supplied.]

And governmental bodies have no more right to question the power of a corporation in a collateral proceeding, than has an individual.

In *Union Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188, the Supreme Court said:

"In *Bk. v. North*, 4 Johns. Ch. 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defense that by the Act of incorporation the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the Government of Pennsylvania, to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of mis-user, by setting aside a just and bona fide contract."

291 It is apparent therefore that if the corporate powers of the Seaboard Air Line Railway Company do not authorize it to engage in mining operations (which is not admitted), only the States in which the corporation is incorporated may question the exercise of such powers.

However, upon the question of powers of a railroad corporation, there is abundant authority in the decisions of the Supreme Court of the United States supporting the view that the power to mine coal comes well within the general purpose for which railroads

are incorporated. In the case of *Jacksonville, Mayport, Pablo R. & Nav. Co. v. Hooper*, 160 U. S. 514, 16 S. Ct. 379, 40 L. Ed. 515, the Court said:

"Although the contract power of railroad companies is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport.

"Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon. To lease and maintain summer hotel at the seaside terminus of a railroad might obviously increase the business of the company and the comfort of its passengers, and be within the provisions of the statute of Florida above cited whereby a railroad company is authorized 'to sell, lease, or buy any land or real estate not necessary for its use,' and to 'erect and maintain all convenient buildings * * * for the accom'dation and use of their passengers.'"

292 and in the same case, quoting with approval from the English decisions the Court said:

"As was said by Romilly, M. R., in *Lyde v. Eastern Bengal R. Co.*, 36 Beav. 10, there was in question the validity of a contract by a railway company to work a coal mine: 'The answer to the question appears to me to depend upon the facts of each particular case. If, in truth, the real object of the colliery was to supply the railway with cheaper coals, it would be proper to allow the incidental additional profit of selling coal to others; but if the principal object of the colliery was to undertake the business of raising and selling coals, then it would be a perversion of the funds of the company, and a scheme which ought not to be permitted, however profitable it might appear to be. The prohibition or permission to carry on this trade would depend on the conclusions which the court drew from the evidence.'"

It is equally well settled that the powers of Applicants, as Receivers of Seaboard Air Line Railway Company, cannot be collaterally attacked.

The United States District Court for the Eastern District of Virginia, the receivership court of primary jurisdiction, by its Order No. 146 (Section V) dated at Norfolk, Virginia, July 31, 1934, approved, ratified and confirmed the action of Applicants in acquiring two coal properties, as well as the making of contracts for the extraction of the coal from the properties thus acquired.

The same court, by its Order No. 168 (Section V) dated September 17, 1935, approved, ratified and confirmed the action of Applicants in acquiring certain coal lands and entering into a contract for the extraction of the coal therein. Although the properties are not mentioned by name the two described in Order No. 146 are the William-Ann and the Glamorgan Mines. The third property, referred to in Order No. 168, is the Chilton Block No. 1 Mine. Certified copies of these court orders have, as requested by counsel for the Commission, been furnished the Commission by Applicants.

293 Mr. Plummer, Applicants' General Attorney, was questioned as to the power of the Receivers to make these contracts and in his testimony referred to the incidental charter powers which inhere in a railroad corporation and also to the above-mentioned court orders (R. p. 171).

Applicants have demonstrated that they have ample power under the orders of the receivership court to acquire the title to the coal in these three mines and to enter into the existing contractual arrangements for the operation of these mines. The powers and authority of receivers is a matter for the court of their appointment, and cannot be raised as a collateral matter. Receivers have no title in themselves—they are mere officers of the Court, acting under the direction of the Court and therefore any effort to question their powers is to question the power of the Court itself. If this is to be done, it must be done in the Receivership Court.

In *Grant, Receiver v. A. B. Leach & Co.*, 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470, one of the questions involved was whether the order of the Common Pleas Court of Ohio, by which that court directed suit to be brought by the Receiver in the Federal Court against the defendant could be attacked collaterally. The decision of the Supreme Court was that the order of the Common Pleas Court was conclusive. The Supreme Court pointed out that a statute of Ohio permitted Receivers under the direction of the Court to bring and defend suits, and to do such acts as the Court authorized, but it said in addition thereto:

294 "But even if this were not the case, the order specifically authorizing and directing the receiver to bring action in the district court was one which the common pleas court had jurisdiction to make in the exercise of its discretion and under the construction which it placed upon the statute; and, as such was not one which, even, if erroneous, was subject to the collateral attack which Leach & Company sought to interpose in the district court."

The Leach case establishes the principle that the powers of Applicants, as Receivers, are not open to collateral attack in this proceeding, and this principle is conclusive and binding upon the Commission.

III

Acceptances, if any, filed by Applicants' operators of membership in the Code not relevant or material to Applicants' right to exemption

At the hearing certain questions regarding acceptance of membership in the Code by the parties operating these mines for Applicants were asked. Applicants submit that whether or not such acceptances were so filed is not relevant or material to the question of right of Applicants to the exemption they claim. Furthermore, such acceptances, if filed, were filed by such parties as a precautionary and protective measure and, by virtue of the provisions of Section 3 (f) of said Act, without any preclusion or estoppel of such parties from contesting the constitutionality of any of the provisions of the Bituminous Coal Act of 1937 or of the Code promulgated thereunder, or of the validity or application either to such parties or to any part of the coal produced at these three mines.

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IV

Petition of Bituminous Coal Producers Board for District No. 8 for leave to intervene in this proceeding

The petition of the District Board for permission to intervene was directly traversed by the Applicants (R. pp. 61, 62) upon the following allegations:

1. That the petitioner is advised and believes that certain coal produced at the said mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, respectively, is not coal consumed by the producer or coal transported by the producer to himself for consumption by him.

2. That petitioner is advised and believes that the commerce in certain coal produced at the mines in Mingo County, West Virginia, Logan County, West Virginia, and Wise County, Virginia, is such commerce in coal as is described in the third paragraph of Section 4 of said Act as "interstate commerce" and is therefore subject to the application of Section 4.

The allegations of Item 1 of intervenor's petition are completely refuted by the documentary and oral evidence introduced by Applicants. Such evidence shows that the title to the coal in the three mines is fully vested in Applicants, that all the coal mined and shipped to Applicants is consigned by Applicants, and that none of such coal is sold or the title thereto otherwise transferred by Applicants. (Exhibits 1, 1A, 2 and 3, R. p. 30, LB, R. p. 34; Mr. Plummer, R. pp. 40, 45, 46, 48, 49, 54, 55, 56; Mr. Kelly, R.

p. 152; Mr. Tynes, R. p. 121; Mr. Gaudin, R. pp. 197, 198, 199; and Mr. Perry, R. p. 214.)

296 (b) The third paragraph of Section 4 of the Act reads as follows:

"For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal."

Under the provisions of this paragraph the application of the Code is expressly limited to (i) the regulation of interstate commerce in bituminous coal, and (ii) to matters and transactions in or *directly* affecting interstate commerce in bituminous coal. Under decisions of the United States Supreme Court cited in subsection 1 (b) of Section I of this brief, it conclusively appears that the mining and production of coal is not interstate commerce. Applicants submit that under these same authorities and the numerous decisions cited therein, it is equally clear that the mining or production of coal does not *directly* affect interstate commerce. [Italics supplied.] In the case of *Carter v. Carter Coal Company*, *supra*, the Court said:

"That the production of every commodity intended for interstate sale and transportation has some effect upon interstate commerce may be, if it has not already been, freely granted; and we are brought to the final and decisive inquiry, whether here that effect is direct, as the 'Preamble' recites, or indirect. The distinction is not formal, but substantial in the highest degree, as we pointed out in the *Schechter Case*, *supra*, 295 U. S. 495, at page 546 et seq., 55 S. Ct. 837, 850, 79 L. Ed. 1570, 97 A. L. R. 947. 'If the commerce clause were construed,' we there said, 'to reach all enterprises and transactions which could be said to have an indi-

rect effect upon interstate commerce, the federal authority
297 would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control.' It was also pointed out, 295 U. S. 495, at page 548, 55 S. Ct. 837, 851, 79 L. Ed. 1570, 97 A. L. R. 947, that 'the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system * * *.'

"The relations of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages

are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character."

Applicants submit that the intervenor's petition should be denied by the Commission for the reason it alleges no facts sufficient to authorize the Commission to permit the Producers Board for District No. 8 to intervene in this proceeding and the allegations of its petition, which were traversed by Applicants, are made only upon information and belief and present no facts and are supported by no affirmative evidence which would justify the Commission in rendering a decision thereon. Applicants further state that if the Commission should grant the leave sought by intervenor to intervene in this proceeding the Commission
 298 should deny all the prayers of said petition because Applicants have shown conclusively and without contradiction that all of the coal produced at these mines and shipped to Applicants is shipped by Applicants to themselves and consumed by Applicants; and upon the further ground that the transactions of the Applicants in the coal involved are not interstate commerce in bituminous coal and are not matters and transactions in or directly affecting interstate commerce in bituminous coal.

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CONCLUSION

Applicants have clearly shown that they are entitled to the exemption sought in their petition, and on each and every of the following grounds:

(1) That (with the exception of the negligible quantity above mentioned) all of the coal produced at these three mines is owned by Applicants, shipped by them to themselves and consumed by Applicants, that no sale or other transfer of the title to such coal occurs and that hence none of the provisions of Section 4 of the Act relate or apply to said coal or to the commerce and transactions therein.

(2) That Applicants are producers within the meaning and intent of Section 4 (1) of the Act, and by virtue thereof said coal, and the commerce and transactions therein, are expressly exempted from all of the provisions of Section 4 of said Act.

(3) That if Section 4 of said Act relates or applies, or purports to relate or apply, to said coal and to the commerce and transac-

tions therein, said section if so applied is unconstitutional, void, and of no effect.

Therefore, the Commission should so find and rule that the said coal, and the commerce and transactions therein, are not subject to the provisions of Section 4 of said Act.

Respectfully submitted.

W. R. C. COCKE,

L. B. PLUMMER,

WM. H. DELANEY,

Counsel for Receivers,

315 S. A. L. Ry. Bldg., Norfolk, Virginia.

Dated October 26, 1937.

300 I hereby certify that I have this day served a copy of the foregoing brief upon all parties of record in this proceeding by mailing a copy thereof, properly addressed to counsel of record for each party.

L. B. PLUMMER,

Counsel for Applicants.

Subscribed and sworn to before me this 26th day of October 1937.

G. R. GARRISON,

Notary Public.

My commission expires March 13, 1940.

302

DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION

Docket No. 49-FD

In the Matter of the APPLICATION OF LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY, FOR EXEMPTION FROM THE PROVISIONS OF SECTION 4 OF THE BITUMINOUS COAL ACT OF 1937

Brief for intervenor, Bituminous Coal Producers Board for District No. 8

303

PRELIMINARY STATEMENT

For convenience the applicants are referred to herein sometimes as "applicants" and sometimes as "receivers"; Dan H. Pritchard, Peerless Coal Corporation and its predecessor, Glamorgan Coals, Inc., are sometimes collectively referred to as "the contractors," and United Thacker Coal Company, the Cole and Crane Trustees,

Glamorgan Coal Land Corporation and the Dingess-Run Coal Company are collectively referred to as "the lessors."

The burden of the argument for the applicants before the Director, both orally and by brief, is to the following effect:

First. That applicants own the coal, and there is no transfer of title thereto; hence, there is no "commerce" subject to congressional regulation, but there is rather the mere "production" of coal.

Second. That applicants are the "producers" of the coal within the meaning of section 4, part II (1) of the Act because the contractors are its agents in the production of the coal.

304 We purpose to show that the applicants are in error in their argument.

I. INTERSTATE COMMERCE

Even under the restrictive definition of interstate commerce applied in the Carter case (which case can now hardly be considered authoritative in setting the limits to which Congress can go in regulating activity under its interstate commerce power), it is submitted that the acts of the applicants and the contractors in the instant case constitute interstate commerce.

Without being required to question the applicants' contention that the *production* of coal is a purely local affair and is not *commerce* within the constitutional provision (Carter v. Carter Coal Company, 298 U. S. 238; Oliver Iron Company v. Lord, 262 U. S. 172), let us first consider what interstate commerce is.

In the Carter case, relied upon by the applicants, the court speaking through Mr. Justice Sutherland, reviews at length the previous cases in which the term had been considered, first stating at page 297:

"We first inquire, then—what is commerce. The term, as this court many times has said, is one of extensive import. No all-embracing definition has ever been formulated. The question is to be approached both affirmatively and negatively—that is to say from the points of view as to what it includes and what it excludes."

The court then refers to the definition made by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 189-190:

"Commerce, undoubtedly, is traffic, but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * *

Mr. Justice Sutherland, citing many cases in support, then makes the following definition himself:

"As used in the Constitution, the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade' and in

cludes *transportation, purchase, sale, and exchange of commodities* between the citizens of the different states. And the power to regulate commerce embraces the instruments by which commerce is carried on." [Italics supplied.]

At page 301 of the opinion the court quotes from the decision of Chief Justice Fuller in *United States v. E. C. Knight Company*, 156 U. S. 1; 12, 13:

"The regulation of commerce applies to the subjects of commerce and not to matters of internal policy. Contracts to buy, sell, or exchange goods to be transported among the several states, the transportation and its instrumentalities, and articles bought, sold or exchanged for the purposes of such transit among the states, or put in the way of transit, may be regulated, but this is because they form part of interstate trade or commerce."

The court concludes its review of definitions of "commerce" at page 303, saying:

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purposes of trade.' Plainly, the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things—whether carried on separately or collectively—each and all constitute intercourse for the purposes of production, not of trade. The latter is a thing apart from the relation of employer and employee, which in all producing occupations is purely local in character. Extraction of coal from the mine is the aim and the completed result of local activities. Commerce in the coal mined is not brought into being by force of these activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject-matter of commerce into existence. *Commerce disposes of it.*" [Italics supplied.]

In his separate opinion in the Carter case Chief Justice Hughes does not disagree with the opinion of the court as to what constitutes interstate commerce, but bases his opinion upon the point that the price provisions are separable from the hour and wage fixing provisions of the Guifey Act (p. 321).

In the Chief Justice's opinion he states at page 317:

"I agree * * * that production—in this case mining—which precedes commerce, is not itself commerce."

At page 319 he further states:

306 "The Act also provides for the regulation of the prices of bituminous coal sold in interstate commerce and prohibits unfair methods of competition in interstate commerce. Undoubtedly transactions in carrying on interstate commerce are subject to the federal power to regulate that commerce and the

control of charges and the protection of fair competition in that commerce are familiar exercise of that power as the Interstate Commerce Act, the Packers and Stockyards Act and the Anti-trust Acts abundantly show. * * *

Justice Cardozo, in his opinion concurring in part and dissenting in part, concedes the power of Congress to regulate prices of coal, if not hours and wages, saying:

"I am satisfied that the Act is within the power of the Central Government in so far as it provides for minimum and maximum prices upon sales of bituminous coal in the transactions of interstate commerce and in those of interstate commerce where interstate commerce is directly or intimately affected * * *" (p. 325).

* * *

"To regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences. The very act of sale is limited and governed * * *" (p. 326).

We must bear in mind the foregoing definitions as we examine the facts before us to determine if there is any interstate commerce in coal.

The applicants, Powell and Anderson, are receivers of Seaboard Air Line Railway Company appointed by the United States District Court for the Eastern District of Virginia (R. 5). The railroad corporation operated under a "consolidated Charter" granted by the States of Virginia, North Carolina, South Carolina, Georgia and Florida (R. 194). There is no West Virginia charter (R. 195).

The lines of the railroad extend through Virginia, North Carolina, South Carolina, Georgia, Florida and other states (R. 208), but they do not enter West Virginia (R. 208).

In the operation of the railroad, applicants consume large quantities of coal, which, prior to 1934, they obtained from ordinary coal producers as they had none themselves (R. 65).

307 In May, 1934, the applicants entered into negotiations with the lessors, which resulted in the leases at bar. The lessor United Thacker Coal Company, which owns 60% of the fee to the William Ann mine (R. 115), is a Maine corporation, doing business in West Virginia. The remaining 40% of the fee is owned by the so-called Cole and Crane Trustees (R. 115), who are residents of Ohio, Indiana, and West Virginia. The mines of these two lessors are located in Mingo County, West Virginia (R. 115), on the N. & W. Railway and the coal must be transported from West Virginia to the applicants in Virginia and North Carolina (R. 201).

The lessor Glamorgan Coal Lands Corporation is a Virginia corporation (R. 111-112), and its mines are located in Wise County, Virginia, on the Interstate Railroad (R. 216, 220) over which the coal is transported to Miller Yard in the State of Virginia, where it is then taken by the Clinchfield Railroad to North and South Carolina (R. 202) and delivered to the applicants.

The lessor Dingess-Run Company is a West Virginia corporation (R. 111-112) with mines in Logan County, West Virginia, on the C. & O. Railway (R. 217). Coal is transported by the C. & O. from the mines in West Virginia to the applicants in the States of Virginia and North Carolina (R. 217, 225).

After the applicants receive the coal, they themselves transport it over their own lines, in various states, where it is consumed by them (R. 225).

The contractors are Daniel H. Pritchard, a resident of Charleston in the State of West Virginia, at the William Ann (United Thacker) and Chilton Block No. 1 (Dingess-Run) mines. Glamorgan Coals, Inc. was a Virginia corporation (R. 112) and, until its receivership (R. 112), was the contractor for the Glamorgan mine. After its receivership the Peerless Coal Company, a Virginia corporation (R. 111-112), became the contractor for the Glamorgan mine.

We have a situation, therefore, in which residents of one state (or rather group of states)—the applicants—wanted coal, 308 which they did not have; we have another group—the lessors—who had coal which they wanted to sell and dispose of; we have a third group which had the desire to sever the coal from the ground so it could be used. Negotiations were entered into leading to the execution of the leases in evidence (Ex. 1, 2, and 3 as modified and supplemented) and the contracts.

Before considering the terms set forth in the leases, it would be well to recall to mind certain peculiarities of coal which have had their effect upon the law. Most property appears only in one aspect, either real or personal. Coal is one of a class, however, which may be either real or personal property. In the ground it is part of the real estate, but, apart, and severed from the ground, it has its own intrinsic value commercially and becomes personal property.

Because of this quality, the law has recognized at least two distinct methods of dealing in coal, either of which method may be freely used by parties dealing in it. Whether they have employed one method or the other depends upon the terms of their contract and their intent.

The first method is to convey the coal *in place*. In such a case title passes to the buyer at once, regardless of whether the coal

is ever mined or severed by him. This method usually, but not necessarily, occurs in conjunction with a sale of the real estate or land.

The second method is to give the buyer the mere right or privilege to sever the coal from the land, for which privilege a rent or royalty in a certain minimum amount may be reserved. Then, as the coal is mined or severed, a price per ton is often fixed upon the coal so mined. In this method title to the coal does not pass to the lessee until the severance or mining of the coal. Mining privileges are themselves valuable property rights, but no title to the coal is passed until it is actually mined. It follows that when the right or privilege of mining the coal has lapsed, 309 the lessee, not having title or right to any unmined coal, cannot remove it after the lease expiration.

These principles are elementary; hence, we shall not exhaust authorities but merely refer the Director to the following which state the rules:

"Although a mining lease is a conveyance of an interest in the land, there is a clear legal distinction between an absolute conveyance of the mineral in place and the grant of a mining right to enter upon the land and convert the mineral into personalty and dispose of it. In case of an absolute sale there is a severance of *of* the title to the realty; in case of a lease there is not, although the mining right entitles the lessee to extract every particle of the mineral. An ordinary mining lease with an option to purchase does not create the relation of vendor and vendee; and an instrument leasing and conveying minerals under a tract of land for a stated rental or royalties for a term of years is a lease and not an absolute grant or conveyance of the mineral in place or a conditional sale thereof. Where, however, although the instrument purports to be a lease, it is apparent from the language and terms thereof that it was the intention of the parties to effect a sale of the mining property, it does not create a lease, but is a sale or conveyance of the minerals in place, or a sale of the mineral products, notwithstanding it provides for the removal and payment for a certain amount of mineral each year, and notwithstanding the grantor reserves a certain interest in the minerals." (40 C. J., Sec. 586, p. 992.)

"Although the owner of the surface is *prima facie* the owner of the minerals beneath the surface and a general conveyance of the land will carry the minerals, it is consistent with the nature and adaptation of mineral property that different persons should own the surface and the underlying minerals, and so the owner of land containing minerals may segregate one from the other, by a conveyance or instrument in writing, so that there is a complete

severance of title and separate estates are created; he may sell the surface and part of the minerals and reserve the other part to himself." (40 C. J., Sec. 554, p. 969.)

"Ordinarily the presumption is against a severance, especially where one is in possession under an instrument which purports to convey the entire estate, and where it is apparent that the intention of the parties is that the grantee shall have merely the right to enter and remove the minerals rather than an absolute title to minerals in place, there is no severance of the estates in the surface and in the minerals, but the grant is of a mere
310 privilege or license, and the *grantee acquires absolute title to only what is removed by him.*" [Italic ours.] (40 C. J., Sec. 556, p. 970.)

"If the grant or reservation is merely of the right to enter and take minerals from the land, especially where it is not exclusive, it is not an absolute grant or reservation of the minerals in place as real estate, but is a mere lease of mining rights, or a mere incorporeal right, privilege or license, to take the minerals from the land, which leaves the title to the mineral in place remaining in the owner of the land, and gives to the person having the privilege or license *no title to the minerals until they have been mined.*" [Italics ours.] (40 C. J., Sec. 562, p. 977.)

"Mining leases form a distinct class of instruments creating special and peculiar legal relations and rights; but a mining lease is a lease in fact as well as in name; a contract of letting. It is generally regarded as a conveyance of an interest in the mining property, which may be assigned or sold * * *. But where the lease is merely of the mining rights strictly speaking it conveys no title to the property or minerals in place.

"As property. A mining leasehold is personal property * * *" (40 C. J., Sec. 583, p. 991.)

"There is a broad distinction between a lease of a mine, under which the lessee enters into possession and takes an estate in the property and a license to work the same mine, in that in the latter case the licensee has no permanent interest, property, or estate in the land itself, but only in the proceeds, and in such proceeds not as realty, but as personal property, and his possession is the possession of the owner, and in determining whether a particular instrument is a lease or a license, consideration shall be given to whether the grantee acquires an estate in the land, whether the consideration is for the entire subject conveyed by title and whether the contract contains any words of grant or demise. In accordance with this distinction, if a contract simply gives a right to take ore from a mine, no interest or estate being granted, it confers a mere license, and the licensee acquires no right to the ore *until he separates it from the freehold*, although it is in the form

of and purports to be a lease." [Italics ours.] (40 C. J., Sec. 585, p. 991.)

"When ore is mined under a lease, the title to it vests absolutely as personal property in the lessee *as soon as it is mined and removed from its original place*, notwithstanding the lease is thereafter forfeited. But a lease strictly speaking does not pass title to the unmined minerals." [Italics ours.] (40 C. J., Sec. 615, p. 1013.)

311 Accord: United States v. Biwabik Mining Co., 247 U. S. 116; Percy LaSalle Mng. Co. v. Newman Mining Co., 300 Fed. 141; Butler v. McGorrick, 114 Fed. 300; Mexican Oil Co. v. Transcontinental etc., Co., 281 Fed. 148; affirmed 292 Fed. 846; Providence Mng. Co. v. Nicholson, et al, 178 Fed. 29.

The very cases from West Virginia relied upon by applicants in support of their claim to own the coal in place, when examined, refute the contention. Thus, in *Minor v. Pursglove Coal Mining Company*, 111 W. Va. 28, the court quotes, at page 30, the above citation from *Corpus Juris*, 40 C. J., Sec. 386, p. 992, and adds:

"This statement of the law finds substantial sanction by the Courts in nearly all jurisdictions, and has been approved by our own Court. *Chandler v. French*, 73 W. Va., 658; *Toothman v. Courtney*, 62 W. Va. 167."

In the case of *Chandler v. French*, referred to, the West Virginia Supreme Court states at page 661 of the opinion:

"The lease did not vest in French (the lessee) an estate in the coal and other minerals in place. It does not in terms purport to convey title to the mineral. Counsel for appellant insist, however, that, properly construed, the writing does vest in the lessee an estate in the mineral for a term of 99 years. In one sense such a lease is a sale of the mineral substance, because it authorizes the lessee to extract it and dispose of it as he pleases. *But until he does so, The Title Remains in the Lessor*, subject to the right of the lessee to sever it from the other part of the realty. *That French was vested with no present title to the coal in place* is borne out by the following authorities: *Steelsmith v. Gartlan*, 45 W. Va. 84; *Smith v. Root*, 66 W. Va. 633 and *Harris v. Michael*, 70 W. Va. 357." [Italics ours.]

All that *Minor v. Pursglove*, relied on by applicants, decides is that a lease passes no title to the coal in place, and is not a bill of sale for personal property—the exact contrary of the constant reiteration of counsel for applicant in oral argument that applicants had title to the coal in place and hence there was no transfer of title.

Likewise, in *Harvey Coal & Coke Co. v. Dillon*, 59 W. Va. 605, the decision is merely that a coal lease is a chattel real, subject to tax, the Court saying at page 628:

"No matter how many estates or interests in land there may be the State can, if it chose, tax each separately."

We quarrel not with the view that lessees have valuable property rights subject to taxation, but that is not tantamount to the conclusion that the lessees have title to the coal in place, before severance, as the Court itself recognized several times, saying:

"The answer is that the grant is not of the very coal. The phrase of the deed is not that. It *leases* the coal. * * * It gives an intangible, incorporeal thing, a right to take actual possession of the tract and use it so far as necessary to take coal and make coke" (p. 613).

"I have just cited a California case showing that the lease does not convey the coal (p. 617).

"The deed in our case grants the tract for a specific purpose, that is, with the right to mine coal and make coke, and does not grant even the coal itself" (p. 617).

The Court concludes its discussion of this subject by noting, on page 625:

"Again, there are so many West Virginia cases, in which the very question as to what manner of estate such leases created was directly involved in which it was held that before finding the mineral no estate whatever passed, and that even after finding mineral that mineral itself in the ground, not yet brought to the surface, is vested in the owner of the surface. We must say that many of our cases settle that. Then, how can it be said that such leases impart ownership in the very coal in the lessee, if it remains in the surface owner?"

The leases in evidence here are Exhibits 1, 2, and 3 and clearly reveal that only the right to mine coal, not the coal itself, is passed. For example, in Exhibit 1, it is recited that, whereas applicants desire:

"* * * the sole and exclusive right and privilege, during the term or period hereinafter mentioned, and of any extension or renewal thereof hereinafter provided for, of mining coal from the veins or seams of coal in, upon or under the tracts or boundaries of coal lands. * * *

After this, it is recited that the lessor wishes to grant such a right, and the agreement is thus stated:

313 "The lessor hereby leases to the lessee, their successors and assigns, for the purpose of mining coal and coke thereon and therefrom, and selling said coal and coke the following property. * * *

In paragraph Third it is specially provided that for "all coal *mined*" the lessees will pay lessor a rent or royalty of 10¢ per ton, and certain minima are specified whether coal be mined or not.

Exhibit 2, the United Thacker lease, has similar provisions from which we quote in part:

"Whereas, the lessees are desirous of acquiring from the lessors the sole and *exclusive right and privilege* of extracting and mining coal for their own use from the veins or seams of coal * * * [Italics supplied.]

which the lessors are willing to give.

"Now, Therefore, lessors lease to lessees: * * * the following rights and privileges: A. The sole and *exclusive right and privilege* of extracting, mining and removing coal for the lessees' own use. * * * [Italics supplied.]

The agreement between the parties in the Glamorgan case is similar, the recitals from the court decree in the receivership proceeding well showing the construction of the rights as placed thereon by the court and the parties:

"Whereas the receivers have leased from Glamorgan Coal Land Corporation * * * the *exclusive right and privilege* of extracting, mining, manufacturing, and transporting from the mine and loading on cars at the mine tipples for shipments * * * the coal in, upon or under all those certain tracts. * * * (Ex. A, attached to Ex. 3, in evidence.) [Italics supplied.]

The exhibits are replete, even in the supplemental contracts, with similar expressions which we shall not quote further. In many of the exhibits are expressions showing that applicants pay only for the coal mined by or for them, and not for any coal in place.

A reading of the oral argument of counsel for applicants discloses how often they emphasize the fact that no transfer of title to the coal takes place, but we respectfully submit that applicants are utterly wrong in such contention. We agree, however, 314 that it would have been better if the examiner had made more specific findings of fact regarding the passing of title. Such a finding would have been justified by the evidence of record.

The result of the negotiations, leases, contracts, and acts of the parties, then, is this: applicants, by negotiation, purchase, and sale have traded money for coal owned by lessors. This coal is owned by the lessors while it is in place; upon its severance from the land, i. e., its production by the contractors, title passes to the applicants, and in due course the coal is physically transported from the mines to the applicants. As the severing of the coal is continuous there is a constant movement in the channels of commerce between the various states where lessors, the contractors,

and applicants are. There is not mere intrastate production of coal but "intercourse for the purpose of trade"; negotiation by means of contracts and leases for the sale, transfer of title or exchange of coal for money, as well as physical transportation from the lessors in one state to applicants in another—the very heart of "interstate commerce" as defined by the Supreme Court.

The Director can reach only the conclusion, we respectfully submit, that there is such "interstate commerce" in the transactions before us constitutionally to support action by Congress, and also to defeat any contention by applicants that their activities are wholly intrastate in character allowing exemption under the provisions of section 4A of the Act.

II. APPLICANTS ARE NOT PRODUCERS

The second main point urged by the applicants is to the effect that, while admittedly they do not produce the coal in the case at bar, in the eyes of the law it is produced by their agents, acting for them. Hence, they claim exemption under section 4, part II, subsection (1) of the Act which provides:

315 "The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

The urging of such a theory can arise only by failure to distinguish between the relation of principal and agent (and the allied relation of master and servant) and the relation of independent contractors. To clear away this confusion, and the assumption by counsel for the applicants that there is no difference so far as this case is concerned, it will be well to consider the reasons for and origin of the distinctions.

Authorities can be multiplied, but we believe that Mr. Justice Holmes, in his famous work, "The Common Law," has so well traced the origin of the doctrine of principal and agent that there is no necessity for elaboration.

He points out that the doctrine of principal and agent, as well as that of master and servant, originally grew out of the instinct or passion of revenge. It is easily seen how a person aggrieved by the acts of another should hold that other responsible and desire revenge upon him or compensation from him.

With injuries inflicted by animals or slaves belonging to a person it was but a step to hold that such animal or slave was guilty and should be the object of offense. In the early law, therefore, an offending animal or slave was delivered up to the person injured to be punished as he saw fit.

It was not difficult to take the next step in which the owner, to save his animal or slave, offered to pay for him.

At page 34 of his work, Mr. Justice Holmes thus recounts the steps:

"A consideration of the earliest instances will show, as might have been expected, that vengeance, not compensation, and vengeance on the offending thing was the original object. The ox in Exodus was to be stoned. The ax in the Athenian law was to be banished. The tree in Mr. Tylors instance, was to be chopped to pieces. The slave under all the systems was to be surrendered to the relatives of the slain man that they might do with him what they liked."

At page 15 he thus summarizes the next development in the law:

316 "What had been the privilege of buying off vengeance by agreement, of paying the damage instead of surrendering the body of the offender, no doubt became a general custom. The Aquilian law, passed about a couple of centuries later than the date of the Twelve Tables, enlarged the sphere of compensation for bodily injuries. Interpretation enlarged the Aquilian law. Masters became personally liable for certain wrongs committed by their slaves with their knowledge, where previously they were only bound to surrender the slave. If a pack mule threw off his burden upon a passerby because he had been improperly overloaded, or a dog which might have been restrained escaped from his master and bit any one, the old noxal action, as it was called, gave way to an action under the new law to enforce a personal liability."

Still later, slaves became free men. When free men were employed by shipowners and tavern keepers, in whom exceptional confidence was necessarily reposed by persons dealing with them, the next step was taken. In Mr. Holmes' words this was described as follows, at page 16:

"The law as to shipowners and innkeepers introduced another and more startling innovation. It made them responsible when those whom they employed were free, as well as when they were slaves. For the first time one man was made answerable for the wrongs of another who was also answerable himself, and who had a standing before the law. This was a great change from the bare permission to ransom one's slave as a privilege. But here we have the history of the whole modern doctrine of master and servant, and principal and agent. All servants are now as free and liable to a suit as their masters. Yet the principle introduced on special grounds in a special case, when servants were slaves, is now the general law of this country and England, and under it men daily have to pay large sums for other people's acts in which they had no part and for which they are in no sense to blame."

At page 232, Mr. Holmes emphasizes the feature of the principal and agent (and master and servant) relationship which distinguishes it from others:

"There is no trouble in understanding what is meant by saying that a slave has no legal standing but is absorbed in the family which his master represents before the law: The meaning seems equally clear when we say that a free servant, in his relations as such, is in many respects likened by the law to a slave (not of course, to his own detriment as a free man). The next step is simply that others not servants in a general sense may be
317 treated as if servants in a particular connection; and this is what is meant by saying that the characteristic feature which justifies agency as a title of the law is the absorption *pro hac vice* of the agent's legal individuality in that of his principal."

It is this legal "oneness" between principal and agent and master and servant, then, that is its distinguishing feature. As a natural manifestation of this unity the possession of articles by the agent, in law, is the same as the possession of the principal; the act of the agent is the act of the principal, who is bound by it and held responsible for it just as though he had actually performed it himself.

In contrast, the independent contractor is distinguished by this very lack of unity. He and the person for whom he does the work are not "one"; they are "independent"; the act of the contractor is his own and the other party is not responsible therefor; he does not hold possession for the other, but for himself; he is free to use any means he desires to attain the end contracted for, and cannot be controlled in the manner of attaining that end.

Applying the principles to the case at bar, we should expect that if the applicants and the contractors (Pritchard and Peerless Coal Corporation) sustained the relationship of principal and agent, it would follow that there existed this "oneness" or "unity" which in the eyes of the law would justify denominating the applicants as the "producers" of the coal.

318 But if, on the other hand, this "oneness" in the eyes of the law is lacking, then the acts of the contractors (Pritchard and Peerless Coal Corporation) in producing coal are not, in law, the acts of the applicants, but of independent and separate legal entities or persons who merely have a contract or agreement with the applicants wherein one party promises to mine or produce coal and the other party promises to pay for it—in short, "independent contractors."

We must, therefore, review the relationship between the applicants and the contractors to see whether they occupy towards each other the relationship of principal and agent or whether they are independent contractors. The tests by which the relation of prin-

principal and agent or master and servant can be distinguished from that of independent contractors are variously defined, but the same general ideas pervade them all:

"The features distinguishing agency from other relationships are representative character and derivative authority. Whether as between the parties their relationship is one of agency depends upon their relations as they in fact exist under the agreement or acts of the parties, and the question is not governed by the stipulations of the parties; and the parties cannot, where the relationship is in fact one of agency, change its nature by declaring that it is not an agency, nor can they, by calling their relations one of agency, make it so when it is not so in fact. Whatever the precise relationship between the parties may be, the relation of principal and agent does not exist between them in the absence of any essential element of such relationship." (2 C. J. S., Sec. 2a, p. 1026.)

"An independent contractor and an agent are not always easy to distinguish, and there is no uniform criterion by which they may be differentiated. Generally, however, the relations are distinguished by the extent of the control which the employer exercises over the employee in the manner in which he performs his work. Where the will of the employer is represented only in the result, and not in the means by which it is accomplished, and the employer retains no control over the employee as to the manner or means of accomplishing the desired result, the employee is an independent contractor, and he, and not his employer is responsible for his own acts and contracts, and the relation is not changed by
319 the employer's reservation of the right of supervision and approval. Where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which the result is accomplished, he is not an independent contractor but an agent; and the relationship is one of agency when the employer reserves control and an interest in the performance of the work other than the finished product, or where the contract shows a recognition of the responsibility of the employer for obligations incurred by the other party.

"Another ground of distinction has been stated to be that the normal function of an agent is the representation of his principal in transactions arising out of business, trade or commerce, while the normal function of an independent contractor is the performance of work predominantly physical in character; and such contrast is not necessarily destroyed by the fact that the agent may perform some manual labor by himself or others in carrying on the business.

"Where a contract contains some provisions, which if they stood alone, would indicate that the true relation was that of independent

contractor and others which indicate that the relationship was that of principal and agent, the spirit and essence of the contract, considered as a whole must be looked to.

"One may be an agent rather than an independent contractor although paid according to the amount of work done; and on the other hand, one may be an independent contractor although he is advanced money to make purchases for his alleged principal." (2 C. J. S., Sec. 2d, p. 1027, et seq.)

"Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." (Restatement of the Law of Agency, Sec. 1.)

"A principal, in the law of agency, is the person for whom another acts and from whom he receives his authority to act. The agent is the substitute or representative of his principal, who acts for and represents the principal, and who derives his authority from him." (2 Am. Jur. Sec. 2, p. 13.)

"An independent contractor may be distinguished from an agent in that he is a person who contracts with another to do something for him, but who is not controlled or subject to the control of the other in the performance of such contract, but, only as to the result. A principal, on the other hand, has the right to control the conduct of an agent with respect to matters intrusted to him." (2 Am. Jur. Sec. 8, p. 17.)

"The mode of payment is an important element to be considered in determining whether the person doing the work
320 is an independent contractor or an agent, although it is not controlling; rather, the courts in the recent cases look to the broader question whether the employee in fact is subject to, or free from the control of the person for whom the work is done. * * * Nor, as it is generally agreed, does the fact, in and of itself, that the contract calls for the payment to be made on the basis of the actual cost of the work and materials, plus an added amount or percentage for the benefit of the contractor doing the work, i. e., a 'cost plus contract' make the relation one of principal and agent rather than a relation founded upon an independent contract." (2 Am. Jur. Sec. 8, p. 18.)

"The principal's liability for the acts of his agent, within the scope of his authority, depends upon the fact that the relation of principal and agent exists. - It is the principal's will that is to be exercised; his purpose that is to be accomplished; his are the benefits and advantages which ensue. He selects his own agent, puts him in motion, and has the right to direct and control his actions. It is, therefore, just and proper that he should be responsible for what that agent does while so employed.

"Where, however, the principal has not this right of control a different rule prevails. Neither reason nor justice requires that he should be held responsible for the manner of doing an act when he had no power or right to direct or control that manner. If, therefore, the principal, using due care in the selection of the person, enters into a contract with a person exercising an independent employment, by virtue of which the latter undertakes to accomplish a given result, being at liberty to select and employ his own means and methods, and the principal retains no right or power to control or direct the manner in which the work shall be done, such a contract does not create the relation of principal and agent or master and servant, and the person contracting for the work is not liable for the negligence of the contractor, or of his servants or agents, in the performance of the work. The employment is regarded as independent where the person renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." (Mechem on Agency, Sec. 747.)

The Supreme Court of the United States has discussed the difference. For example, in *Casement v. Brown*, 148 U. S. 615, the defendants had agreed with a railroad company to construct piers for a bridge over the Ohio River, in accordance with plans furnished by the company. At page 622, it is said:

"Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form, and place of the piers were 321 determined by them, and the defendants contracted to build piers of the prescribed form and size and at the places fixed. *They selected their own servants and employees. Their contract was to produce a specified result. They were to furnish all the material and do all the work, and by the use of that material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave to the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for daily supervision and approval of both material and work.*" [Italics supplied.]

It is readily apparent that underlying all tests is the necessity for determining whether the party for whom the work is being done retains control of the means of doing the work as well as the result. And, in the light of the origins of the doctrine of principal and agent, this is readily understood, for if the control

is retained by the party for whom the work is being done, it is in reality his own act, and not the act of the worker; the latter is but the instrumentality or tool of the former; he is a third arm, and the law then recognizes the acts of the agent as in reality those of the principal.

Returning now, to the case before us, we find the following circumstances indisputably existing:

First: The applicants in their leases and contracts have expressly, in so many words, described the relation with Pritchard and Peerless Coal Company as that of independent contractors. For example, in Exhibit 1, the lease from Glamorgan Coal Land Corporation to the applicants, after reciting that the applicants desire to secure the privilege of mining coal it is stated that they also desire.

"* * * the further right and privilege of contracting with an independent contractor (hereinafter called the 'contractor') for the service and work of mining * * *."

322 In the contracts with Pritchard and Peerless it is similarly specifically provided that the relationship of the contractor to the applicants is solely that of an independent contractor, and as such the contractor shall be solely responsible for all of the actions, negligence, or omissions of himself and his agents.

Second: The draftsman of these contracts, Mr. Plummer, attorney for the applicants, testified that this express references to the relationship as being that of an "independent contractor" was purposely and intentionally done (R. 72):

"Q. In the contract he (Pritchard) is mentioned as an independent contractor.

"A. That is in there to protect the receivers against claims or possible claims of third parties.

"Q. Your liability is limited from the acts of Mr. Pritchard in the operation of this mine?

"A. We are protected under the contract provisions against any liability, and we certainly have a right of reimbursement there against Mr. Pritchard, I think, for—

"Q. Will you please answer my question, and then you may make a statement afterward.

"A. Yes."

Third: The applicants have no control over the employees of the contractors or the miners, nor do they have any control of the operation of the mines or manner of mining the coal.

"Q. Does he (Pritchard) have the exclusive right to hire and discharge miners in the operation of the mine?

"A. I think he does" (R. 73).

"Q. Do the receivers have any control over the Peerless Company in the operation of the mine?

"A. In what respect?

"Q. With reference to the employment of the miners or in reference to directing them how they shall mine the coal.

"A. Not that I know of" (R. 79).

"Q. It is your contention that the receiver has absolute management and control of the contracting mines as to the operation?

"A. No, we don't contend that exactly. We contend, sir, that we own the coal; * * *" (R. 89).

323 "Q. So that the only control which the receivers of the Seaboard Airline Railways exercised over Mr. Pritchard was in the specification of the tonnage that was to be delivered over certain periods of time? Is that true?

"A. That is my recollection. * * *" (R. 101).

Cumulative testimony from the record could be cited, to show that the applicants retain no right to control Pritchard or Peerless Coal Corporation in respect to the manner in which the coal is produced, but are concerned only with the resulting coal.

Fourth. The contractors are paid a flat sum per ton by the applicants (R. 46 and exhibits) the distribution of which is entirely up to the contractors, and over which applicants have no control.

The contrast between ordinary "producers" of coal, and the status of the applicants if they are "producers" is interesting, to say the least. Ordinarily, coal producers are subject to certain responsibilities and liabilities; they risk a certain capital investment for coal lands or coal rights, for tipples and mining equipment; applicants have none; ordinary coal producers must conform to union and legal wage and hour scales for their workmen and miners and are legally responsible for evasions thereof; applicants are not; the ordinary producer often supplies homes, and maintains stores and other services for the workmen and their families; applicants become liable and responsible for none of these things; ordinary producers have legal responsibilities and liabilities for injuries to their workmen and to third persons incurred in the mining operations; applicants do not; ordinary producing corporations must qualify under a West Virginia charter or as a foreign corporation; applicants claim not to be required to do so.

Applicants here urge that insofar as escaping the provisions of the National Bituminous Coal Act are concerned, they are the producers of the coal, hence exempt.

Yet, they would be the first to contend—indeed, they do
324 now contend, as shown by Mr. Plummer's testimony, quoted in part above—that, so far as everything else is concerned, they are not producing the coal themselves; hence, that they are not liable if workmen are injured at the mines, or if Pritchard or Peerless become bankrupt or insolvent and fail to pay their taxes.

their workmen's wages, or other bills. That insolvency is not a remote contingency in the production of coal is evidenced by the necessity for a National Bituminous Coal Act, and its preamble, as well as by the testimony in the record regarding the failure of Glamorgan Coals, Inc., predecessor of the Peerless Coal Company (R. 112), and the failure of Mr. Pritchard's brothers in the operation of the William Ann Coal Company (R. 116, 117). Yet, applicants would be, and are the first to claim no responsibility in such event, solely upon the ground that they are not producing the coal by their agents, but through independent contractors.

Without questioning the right of a person to be an independent contractor as to some parts of another's business, and an agent as to other acts, we submit that one cannot be agent and independent contractor in relation to the very same acts.

"While in all ordinary transactions the existence of the relation of contractor as between two given persons *excludes* that of principal and agent, or master and servant, there is not necessarily such a repugnance between them that they cannot exist together, and an employee may be an independent contractor as to *certain* work, and yet be a mere servant as to *other* work for the same employer." [Italics supplied.] (14 R. C. L., Sec. 13, p. 76.)

But, one person cannot be both independent contractor and agent for the same work, for the two are mutually exclusive. The employer cannot retain control over the manner of the employees work—(the very essence of agency)—and at the same time not retain control over the manner of the employees work—(the very essence of the independent-contractor relationship).

325 In this case there is but the one act or work—production of coal; and the question is—in the act of producing coal, are the contractors agents over whom the applicants have control in the manner of producing the coal, or are they independent contractors over whom applicants have no control as to the manner of extracting coal? If they are agents in the production of coal, then it is as if applicants were producing the coal, and applicants would be liable for their debts, their negligence, and could control them.

On the other hand, they cannot consistently claim all the benefits of independent contractorship, free of the burdens of actual producers of coal, and shielding themselves from obligations and liabilities incurred in its production for every purpose, and yet claim that they are producers of coal so far as this statute is concerned.

Having expressly stated, conceded and contended that they have none of the obligations of principals, the result must be that as to the production of coal Pritchard and Peerless are independent and not agents. Having chosen the latter interpretation, and urged such construction of the terms of the contracts to defeat

responsibility toward third persons (including State and Federal authorities), we respectfully submit that applicants should not be heard here to contend the opposite.

Inasmuch as Section 17 (c) of the Act defines producer as follows:

"The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

and as applicants neither mine the coals themselves nor through legal agents, but the coal is mined by persons entirely independent of the applicants, the conclusion is inescapable that applicants do not come within the exemption provisions of section 4, part II (1).

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III. THE "ROCK ISLAND" CASE

The decision of the Seventh Circuit in the cases of Consolidated Indiana Coal Co. v. National Bituminous Coal Commission, 163 F. (2d) 124, although founded upon facts directly opposite to those before us, and hence directly opposite in result, is based upon the same principles of law for which we contend.

The Court recognized that the determining factor was whether the trustees of the railway were independent of the mining corporation, or whether the latter was their agent and instrumentality, so that the acts of the agent were those of the principal, concluding at page 128:

"The conclusion is inescapable that petitioner was agent of the trustees in the production of coal. * * *

The Court reached this conclusion as the evidence showed that, while the railway and the mining company were two separate corporations, the railway and its trustees not only controlled the result, the production of coal, but also the means and actual mining of the coal.

The Court emphasizes the fact that the railway owned all the stock of the mining company; applicants owned none of the stock of Peerless, and Pritchard, of course, is not owned by the applicants.

The arrangement extended back for eighteen years or more; it was not devised indirectly to avoid the act. The railway company in 1905, had actually advanced \$273,000.00 to purchase coal lands in Iowa, so that it apparently had actual title to the land, not a mere right to mine the coal. Applicants have no coal land nor title to coal in place.

The railway furnished all of the money to the mining company—no funds having been obtained from any other source. Applicants furnished none of the original capital of the con-

tractors, and, while the contractors use the money they receive from the applicants, that is true of every producer
327 selling coal to his customer.

The Rock Island had complete control over the mining company; the President of the mining Company was Secretary for the railway trustees; the General Auditor of the mining company was General Auditor for the trustees; the Secretary and Treasurer of the mining company was Assistant Secretary and Treasurer of the trustees; the Assistant Treasurer of the mining company was Cashier for the trustees; all of the mining company's officers were full time employees of the trustees and received their pay from the railroad trustees. None of this is true as to the applicants and the contractors.

The mine superintendent in the Rock Island case reported directly to and performed all his duties under the supervision and direction of the chief operating officer of the railway trustees who was not an officer of mining company. Applicants have no such control over the mining superintendent of the contractors.

The purchase of all materials and supplies for the mining company was done by the Purchasing Agent for the Trustees; applicants have no control over Pritchard and Peerless' purchases. (R. 93). The legal department of the railway acted for the mining company without compensation; applicants have no control over the attorneys for the contractors.

The mining company in the Rock Island case had no debts, for the railway assumed and paid them all; applicants not only have not assumed the debts of Peerless and Pritchard, but have hedged in every way to avoid being compelled to assume debts of the contractors.

The Rock Island trustees had complete control, supervision and dominion over the mining corporation as to the amount of coal produced and the time of its production. Applicants have no such control over production. While they have the right, within limits to specify the amount of coal that may be delivered to them in any week, they cannot control the amount that
328 Pritchard and Peerless produce, or the time of production.

Their right to specify delivery is no greater than any other consumer has in buying from ordinary producers.

The mining corporation in the Rock Island case made no profit, could make no profit, and never paid a dividend. In the case at bar, Pritchard and Peerless endeavor to make a profit, but whether they do or not is no concern of the applicants, and they may or may not make any, just as any other coal producer may or may not, depending upon his own efficiency and other factors (R. 93).

While the mining corporation and the Rock Island trustees had separate bank accounts, and hired and fired its employees, yet the

court points out that these were mere matters of bookkeeping as all of the money in the account was furnished by the trustees and the mining company at no time had any money which belonged to it. In the case at bar, applicants have no control or right of control over the bank accounts of Peerless and Pritchard. In the hiring and firing of the miners, the Rock Island trustees had direct control, supervision and direction, whereas the applicants have none.

The Court points out that inclusion of the Rock Island under the Act would be but a useless gesture, as the railway would only have to pay any increase in the cost of production to the mining corporation, which in turn would legitimately hand back any profit to the railway. Such profit here would, under the law, accrue to the contractors, however, and could not be legally rebated.

In the Rock Island case, therefore, under all the definitions of agency above referred to, the trustees of the railway having retained control over the details and means of mining, as well as over the result, it was a true agency. On the contrary, 329 in the case at bar, the applicants, having no such control, cannot be principals but have only a contract with independent producers.

IV. EVASION OF THE ACT

One feature of the case before us, with regard to which we feel the examiner failed to make sufficient findings, is the obvious endeavor of the applicants to evade the statute. The entering into of the present mode of operations was clearly motivated by the desire and intent to avoid the price-fixing provisions of an Act of Congress.

Prior to 1934, in the normal course of their business which covered almost one hundred years, the applicants and the railroad had purchased all their coal from ordinary producers (R. 65); counsel frankly testified that this plan was devised in 1934 when the N. R. A. came into operation, in order to escape compliance with its price fixing provisions and thus lower the cost of coal to the trustees (R. 57, 66, 106). The latter desire the applicants share with a host of consumers who have endeavored to cut costs of coal by one means or another, with an eye single to their own advantage and regardless of the effect upon others and the cost of production, with the resulting chaos in the industry which this act was designed to remedy.

Additional proof that this scheme was developed primarily to circumvent the price-fixing laws are the provisions of the leases and contracts fixing the period of the commencement of the leases and contracts, the agreement as to renewal in the event the Supreme Court upheld the constitutionality of the Guffey Act (R. 99, 136).

and the right of cancellation which would arise in the event this Act is invalidated and coal may be purchased more cheaply elsewhere (R. 87).

These matters are all properly to be considered in connection with statutory construction. Congress had a situation confronting it, calling for legislation; that situation was the 330 unsettlement in the coal producing industry due, at least in substantial part, to vicious price cutting regardless of cost and good business judgment. It is a cardinal principle of statutory construction that statutes are to be liberally construed with a view to carrying out the legislative design, and that no matter how cunningly devised, nor with what sophistry urged, indirect methods of evading the legislative intention will not be countenanced.

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable." (59 C. J., Sec. 571, p. 961, citing a mass of Federal and State authorities in support.)

To adopt the construction urged by the applicants will emasculate the law. Applicants had no coal to consume; they owned and operated a railroad; they needed coal and were willing to barter money for it. Lessors, in other states, had coal which they were willing to sell. The contractors, in different states from applicants, were willing to exchange their services for pay. This is commerce.

Noting that prices would be fixed so as to cover cost of production, as specified in the Act, they hit upon this device to trade their money for the coal and services which they needed but did not have.

Congress no doubt had in mind the responsibilities of producers of coal as that term was used in the industry when the act was passed. Normally, they have a certain capital investment, an obligation to miners and employees, a responsibility to third 331 persons. These factors all entered into cost of producing coal, and, when not fairly covered by the selling price, the public, including employees and creditors, suffered.

But the applicants, according to their own words and contention, have no capital investment, no obligation to third persons, no responsibility in case of bankruptcy or insolvency or mere nonpay-

ment of the debts incurred in the production of the coal which they consume.

Many consumers would be deterred by the risks of production, if they had to engage in it personally or by agent for whose acts they were responsible. But, if the applicants' contention is sustained, they can gain freedom from such responsibilities. Large consumers of coal can enter into similar arrangements with one or more rail mines according to their needs; lesser consumers may avail themselves of exclusive contracts with the smaller rail and even so-called "wagon" mines, or in the alternative a group of consumers may band together.

Indeed, on the theory of the applicants, even the smallest consumer may enter practicably into such a contract and lease. The law does not forbid an agent acting for more than one person at the same time.

One consumer requiring 100 tons a year could enter into such arrangements with lessors and contractors, placing maximum limits of 100 tons a year instead of the thousands of tons maximum specified by the applicants; in the mining of such 100 tons the contractor would be the consumer's agent just as surely as he is the agent of applicants if their contention is upheld; hence the consumer would be both producing and consuming that 100 tons and entitled to exemption. At the same time some other consumer would have a similar contract with the same lessor and contractors at the same mine, and, since a person may be agent for two or more people at one and the same time, the contractor would also be an agent for the second consumer, as regards his coal, and so on for all his customers.

332 All that would be required to exempt every transaction from the provisions of the Bituminous Coal Act would be for producers to print form leases and contracts similar to those at bar, designating themselves as independent contractors for every purpose, except that they be the agent of the consumer for a certain number of tons of coal to be produced. As stated before, many consumers ordinarily would be dissuaded from "producing coal" upon considerations of the capital investment needed, the risk of financial loss, the obligations to the state, the miners, and third persons. With the device here used, however, consumers could "produce" coal by "agent" and so be exempt from the Act; and yet be immune from any of the attendant responsibilities, financial outlays, experience, and liabilities of the ones actually producing the coal.

CONCLUSION

We submit that, if regard is had to well-settled rules of constitutional law, agency, and statutory construction there can be but one analysis and one result in the case before us, to wit:

First: That there is such interstate commerce here upon which action of Congress is Constitutionally bottomed;

Second: That Pritchard and Peerless Coal Company are not agents of applicants but independent contractors.

Third: That not being agents, Pritchard and Peerless, in the eyes of the law act for themselves and are not "one" with the applicants so as to constitute the applicants the "producers" of the coal.

333 Fourth: That to extend the exemption of section 4, part

II (1) of the Act to consumers operating through independent contractors will eviscerate the law, and such construction is forbidden by long settled judicial principles.

The application for exemption should be denied.

Respectfully submitted.

(Signed) BURR TRACY ANSELL.
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SEPTEMBER 25, 1939.

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DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION

Docket No. 49-FD

In the Matter of APPLICATION OF LEGH R. POWELL, JR., AND
HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE
RAILWAY COMPANY, FOR EXEMPTION FROM THE PROVISIONS OF
SECTION 4 OF THE BITUMINOUS COAL ACT OF 1937

*Reply of applicants to brief for intervenor, Bituminous Coal
Producers Board for District No. 8*

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WM. H. DELANEY.

Counsel for Applicants.

OCTOBER 9, 1939.

THE INTERVENOR'S CONTENTION THAT THE APPLICANTS ARE ENGAGED
IN COMMERCE SUBJECT TO CONGRESSIONAL REGULATION

In answer to the applicants' undeniable assertion that they own the coal at their three captive mines, and that there is therefore no commerce in the coal within the meaning of the National Bituminous Coal Act of 1937, intervenor resorts to the novel argument that because the title to coal does not vest in applicants by virtue of the lease the severance of the coal by the contractor effects a transfer of title which sets in motion a contiguous transaction which is interstate commerce, and is thus brought within the regulatory powers of Congress. Intervenor seeks to apply the flow of commerce doctrine as the Supreme Court construed it in the *Jones & Laughlin* and related cases (*National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1), which manifestly has no application in this case. It is admitted that title to the coal here is transferred to the Receivers at some point before the mining operation has been completed, hence if there is any commerce or trade in the coal, as distinguished from its mere interstate transportation, it takes place before its production and before the point at which the regulatory purposes of the Act are intended to take effect. The Supreme Court has repeatedly held that mining is not commerce. In fact, the quotation from the *Carter* case (*Carter v. Carter Coal Co.*, 298 U. S. 298, 303) quoted by intervenor on page 3 of its brief, in part clearly establishes this principle:

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade.' Plainly the incidents leading up to and culminating in the mining of coal do not constitute such intercourse."

2236 Until, therefore, the mining operation is finished, and plainly it is not finished until the coal reaches the surface of the ground, the operations at applicants' mines or at any other mines are local in their nature.

Whatever may be the power of Congress over the production and interstate transportation of coal, academically considered under the "flow of commerce" or any other metaphorical doctrine, the regulation undertaken by Congress in the Bituminous Coal Act plainly contemplates a transfer of title or other disposal of coal by the producer before such coal comes within its purview. Intervenor contends that there is a transfer of title to the coal, but it does not and of course could not maintain that title is transferred by the contractor. It is obvious that the transfer of title, whenever it occurs, is a transfer of title from the land-

owners before production is completed and that as between the applicants and the contractor the former are at all times the owners, and there is no "commerce" in the coal between them.

Since it is incontestable that there is no transfer of title of the coal involved from the contractors, the question whether title passes under the leases at the date they are made or whether it passes upon severance, when the coal is shot down from the face at the beginning of the mining operation, is a matter of no consequence in determining the right to exemption.

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II

THE CONTENTION THAT APPLICANTS ARE NOT PRODUCERS

Intervenor's second contention is that applicants are not producers within the meaning of Section 4, Part II (1) of the Act because they employ independent contractors to perform the mining operations. It is apparently admitted that if the coal were being produced by agents of the Receivers it would be exempt, but it is asserted that the independent contractors are not agents, and in pursuit of this thesis many pages of the brief are devoted to a dissertation on the history of the development of the law of agency. While we think intervenor is in error here, it is unnecessary to take issue on the point, since the sole question is: for whom is the coal involved mined? There is but one answer to this question. It was the plainly stated intention of Congress to grant exemption to those persons who produce coal and consume it, whether they produce it themselves, i. e., in person, or have it done by servants or other agents or agencies. The test is whether the owner of the coal and the consumer are one and the same. If they are, all the requirements for an exemption under the provisions of the Act are fulfilled. The existence of the entity entitled to exemption is conclusively established where it is shown that ownership of the coal involved, in the ground or upon severance, is in the person who consumes it. When such showing of ownership is made the intervening functions of
 338 others do not alter or impair the absolute dominion of the owner, or affect his proprietary interest. Such intervening functions are and must be performed in subordination to the owner's rights, subject to his will and direction and can be nothing but performance under an agency relation, no matter what name or label is attached to it. This is the only logical conclusion as to the meaning of the exemption requirements when the whole purpose of the Bituminous Coal Act is considered. Price cutting and price cutting alone brought about the passage

of the Coal Act. All the evils which the Act seeks to cure grow from that one thing. Strikes, bankruptcies, and general unrest in the industry are the direct results of price cutting. Congress never intended to regulate any part of the industry in which the evil of price cutting did not exist, whatever may be the extent of its power over production or transportation of coal, abstractly considered. Price cutting does not and cannot exist in applicants' operations. Applicants admit that operations such as theirs may deprive certain commercial producers of a tonnage they would otherwise get, but no one would suggest that applicants should be deprived of their legal rights or of coal which they own, at least upon severance, merely in order to throw the coal back into an already vastly oversupplied general market.

If the exemption here sought is not granted, a very anomalous situation will be presented. In applicants' three mines there is coal under the absolute control of applicants. It cannot be produced by the landowners or by the contractors. The applicants alone have the right to produce that coal. What then is to be done? Does the Director have power to say that applicants shall mine the coal in a given manner? Does he have the power to say that the contractor shall charge applicants the code price for their own coal? Does he have power to say that applicants shall sell their coal to the contractor, and in turn buy it back from him at the code price? If he has this last-mentioned power has he the right to set a price at which applicants shall sell their coal to the contractor? Under the facts as they exist in this proceeding these questions cannot be answered under the powers conferred by the Bituminous Coal Act. The impossibility of finding logical answers for them clearly demonstrates that the coal production involved is a production through an agent, since it is and can be produced for applicants only, if, when and to the extent they give direction and consent. The names by which the persons who are working for applicants are called is of no significance.

Applicants wish to direct attention to the authority heretofore cited in their brief (pp. 16-17) to the effect that an independent contractor is an agent, insofar as his relations with his principal are concerned, and with respect to third persons in various circumstances. The rules which have grown around and which are used to make a distinction between "agents" and independent contractors are in reality rules for determining primary liability in tort to third parties. Much of the argument of the intervenor is directed to showing that the relation of principal and agent can exist only when the doctrine of respondeat superior applies.

340 All this is only the traditional lawyers' way of saying that under the circumstances one person is responsible in damages or otherwise for the acts of another. Here it cannot be doubted that the applicants are responsible to the owners of the lands with respect to the extraction of the coal, and no one would seriously consider an attempt by the Receivers to evade responsibility to the landowners for royalties on the ground that their contractors were "independent," if, say, the contractor caused a train of coal to be diverted and sold to outsiders or otherwise embezzled or stole the coal. In the determination of the obligations of the Receivers to the landowners with respect to operations conducted on the property under contract with the Receivers and at their instance and direction, the question whether the operators are servants or "independent" agents of the Receivers would obviously be irrelevant, and so it is with reference to the status and obligations of the Receivers under the provisions of the Bituminous Coal Act. Here the determinative question is whether the coal is consumed by the person who has the ownership or beneficial interest in it in the ground. Whenever a consumer of coal produces coal which he owns, regardless of the medium, means or instrumentality used for the production, the Act grants exemption from its requirements. Here the Receivers are the only persons in the world who have the right to extract, that is, to produce, the coal in these mines. They arrange for its production through the agency of independent contractors. Whether the instrumentality through which production of the coal is carried out renders the producer or principal liable in tort to third parties is plainly beside the issue.

341 The greatest part of the discussion by intervenors is addressed to the abstract and hypothetical question of the liability of the Receivers to third persons through the principle of respondeat superior. It is clear that intervenors assume that agency is the equivalent of employment—that an agent must be a servant. That the assumption is false is demonstrated by reference to the quotation (applicants' brief and exceptions, pp. 31, et seq.) from the Restatement, which will dispel any doubt that the notion is not entertained by courts or scholars.

The provisions of the Coal Act which exempt from its provisions coal consumed by the producer or coal transported by the producer to himself for consumption by him must be construed in the light of long prevailing practices in the coal mining industry and not by tenacious adherence to legalistic definitions which have been evolved in the solution of different problems. The speciousness of the intervenor's argument that applicants are not pro-

ducers can best be revealed by posing the question: If the applicants are not the producers in the transactions here involved, who is? Certainly it is not the lessor, whose only share in the entire series of events affecting the coal is the transfer of the title to the coal and the right to mine it from itself to the applicants. Thereafter he is an entire stranger to what takes place. Equally clearly it cannot be the contractor, who at no stage has any proprietary or beneficial interest in the coal or any power of disposition over it other than the services performed by him for, under contract with and under the supervision of the applicants in extracting the coal from the mine. The applicants' interest, on the other hand, attaches to the coal while in the

ground, and everything that takes place subsequent to the
342 execution of the lease, including the extraction of the coal,

its loading on the cars of the applicants and its transportation to the point of use and consumption is done by and for the applicants. It is impossible to perceive what attributes and functions could more comprehensively define a producer.

The intervenor points (Brief, p. 23) to Section 17 (c) of the Act as support for the view that in the circumstances of this case the contractor is the producer within the meaning of the Act. That section merely provides that the term "producer" includes all individuals, etc., engaged in the business of mining coal. The argument that this language designates the contractor as the producer here proceeds wholly on the assumption that the contractor, although an independent contractor so far as tort liability is concerned, is not also an agent of the applicants in the production of the coal for their use. As we have already shown, the premise is unsound and the conclusion therefore false.

THE ROCK ISLAND CASE

The Rock Island case (Consolidated Indiana Coal Co. v. National Bituminous Coal Commission (CCA 7th), 103 F. (2d) 124, does not support the contentions of intervenor. On page 128 the court said:

"Respondent (National Bituminous Coal Commission) evidently predicated its conclusion (that exemption should be denied) upon the theory that petitioner on the one hand, and the trustees on the other, constituted separate corporate entities and ignored the contention advanced by the petitioner that it was merely serving the trustees in the capacity of agent and that, as such, it was only an instrumentality of the trustees. In this, we think, respondent is in error. The conclusion is inescapable that petitioner was the agent of the trustees in the production of coal, and this is true irrespective of whether petitioner

and the Railway Company be considered as separate and distinct corporations, or whether, under the circumstances, they be considered as merged." [Italics supplied.]

343 From this language it is plain that the dominant reason for the court's decision was the fact of the agency relation between the miner and the consumer. There is nothing either expressed or implied in the decision which is inconsistent with the basic contention of the applicants in the instant case that the agency relationship exists notwithstanding that the party extracting the coal is an independent contractor from the standpoint of tort liability. That the case is controlling authority for the exemption is made clear by the following statement of the Court with regard to the agency by which the coal is extracted:

"There are numerous cases wherein the courts have recognized that a corporation, in its relation with another, may be merely that of agent, and we see no reason why it should be otherwise. In the instant situation, the trustees of the Railway Company could produce coal only by agents, and we discern nothing to preclude a corporation from being the agency thus utilized. We therefore, are of the opinion that the coal involved in this proceeding was produced by the trustees by and through the agency of petitioner, and that it is consumed by the trustees in the operation of its railroad. Being both the producer and the consumer of the coal, it is entitled to the exemption provided in Section 4-II (1) of the Act."

That an entirely independent corporation may be the agent of another for a specific purpose is strikingly illustrated by the recent decision of the United States Circuit Court of Appeals for the Ninth Circuit, holding that the public utility company operating in San Francisco is the agent of the city in the transmission and distribution of electric energy generated at a city-owned water-supply dam many miles away.

City of San Francisco v. United States, 7 U. S. Law Week, p. 290 (Sept. 26, 1939).

344 There the city owned the potential electric power created by the head of water impounded by the dam, and arranged with the utility, as an expert in the production and distribution of electricity, to produce or extract the power from the falling water and transmit and distribute it over the wires owned by the utility, for the account of the city. The court in that case did not allow any extraneous issue as to the "independence" of the utility to obscure the fact that in the production and distribution of the electricity, owned in potential or in place by the City, the utility was the agent of the city.

EVASION OF THE ACT

Intervenor comments upon the alleged efforts of applicants to evade the Act, although the coal was bought and contracts made three years before the Act was even introduced as a Bill in Congress. Aside from the time element, it is clear that the charge adds nothing to the argument, since the applicants are either exempt by the plain words of the law or they are not, regardless of their good, bad or just plain common sense intentions.

Intervenor (Brief, p. 29) argues that if applicants' contention is sustained, other consumers of coal can enter into similar arrangements and can so escape regulation under the Bituminous Coal Act. The fallacy of this argument is that it assumes the purpose of the Act to be to deter consumers from becoming producers of coal, contrary to the plain language of the Act. If it was the purpose of the Act to do what the intervenor
345 argues was intended, there was no reason for Congress to insert an exemption provision as it did. Applicants are supported in their view by the testimony of Mr. Hosford before the Senate Committee on Interstate Commerce (Hearings before Committee on Interstate Commerce, U. S. Senate, 2d Session, 74th Congress, on S. 4668, June 3, 12 and 13, 1936, pp. 32 and 33):

"Senator MINTON. One other question. Do you take into consideration captive coal mines in the area in arriving at the weighted average?

"Mr. HOSFORD. Inasmuch as captive coal does not affect the commercial market, it has been disregarded, sir.

"Senator MINTON. And in this bill it is only considered for the purpose of the tax?

"Mr. HOSFORD. Yes, sir.

"Senator DAVIS. What percentage of the coal produced now is consumed by railroads?

"Mr. HOSFORD. Approximately 25 percent.

"The CHAIRMAN. So that the operator that has a captive mine would have an advantage over his competitors, would he not, because he would get his coal for as low a price as he wants to?

"Mr. HOSFORD. He always could do that, Senator.

"The CHAIRMAN. I say, he still can. The effect of it would be to raise the price, though, to the man who has not got a captive mine, would it not?

"Mr. HOSFORD. You mean, the effect of this bill?

"The CHAIRMAN. Yes. What you want to do is to raise the price of coal?

"Mr. HOSFORD. Let us analyze it, Senator.

"The CHAIRMAN. Before you do that, let me ask you this: I suppose if this bill is going to be effective it is going to have a tendency to raise prices of coal where these people are cutting prices?"

"Mr. HOSFORD. That is correct.

"The CHAIRMAN. Consequently the man who has a captive mine can still get his coal more cheaply, but the man who has to buy it will not be able to get his coal cheaper, because you raise the price of the coal to him; is not that correct?"

"Senator MINTON. The man who has a captive mine is not competing at all.

"The CHAIRMAN. Yes, he is; he is competing in the industry.

"Mr. HOSFORD. As I understand the language of this bill, the price provisions do not apply to captive coal at all.

"Senator DAVIS. What percentage of the coal produced is captive coal?"

"Mr. HOSFORD. I would say approximately 10 percent; slightly over that, Senator Davis.

"Senator NEELY. How much of that is consumed by the general public, what proportion of it, and what proportion
346 by the owners of the captive mines? In other words, to what extent does that captive coal compete with the other part of the mining industry?"

Mr. HOSFORD. It does not compete directly, sir.

Senator NEELY. That is what I thought."

(See also testimony of Mr. Chas. F. Hosford, Jr., in Hearings before Committee on Interstate Commerce, U. S. Senate, 75th Congress, 1st Session, on S. 1, March 1, 2, 8, and 15, 1937, pp. 25 and 26.)

Nothing could more clearly evidence the fact that Congress was fully advised that captive coal would not be regulated by the Act and that it was not the intention of Congress to regulate it.

CONCLUSION

Applicants submit that the function of the contractors employed by the applicants is to dig coal for them. Beyond the authority given them by applicants they have no power, and they are acting as the chosen instrumentality of the applicants for the production of the coal.

Intervenor studiously avoids discussion of the absence of any sale between the contractor and the applicants, and of the inherent impossibility of charging a price for coal admittedly owned by applicants immediately upon severance if not before—

circumstances which we submit render impossible an adverse decision on the application for exemption.

Respectfully submitted.

W. R. C. COCKE,
JOS. F. JOHNSTON,
L. B. PLUMMER,
WM. H. DELANEY,
Counsel for Applicants.

JOS. F. JOHNSTON,
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A copy of the foregoing Brief has this day been mailed to the parties of record.

JOS. F. JOHNSTON,
Counsel for Applicants.

OCTOBER 9, 1939.

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SEABOARD AIR LINE RAILWAY.

LAW DEPARTMENT,
Norfolk, Va., Oct. 7, 1939.

Via U. S. Registered Mail.

F-80710-B

MR. A. C. PRICE,

*Docket Section, National
Bituminous Coal Commission,
Washington, D. C.*

DEAR MR. PRICE: I enclose herewith the following papers which at the hearing on September 22nd and 23rd last before the National Bituminous Coal Commission upon the application of the Receivers of Seaboard Air Line Railway Company for exemption it was understood we would furnish the Commission.

(1) Certified copy, and two uncertified copies, of Application and Order No. 146, filed on July 31, 1934, in the receivership cause of Seaboard Air Line Railway Company in the District Court of the United States for the Eastern District of Virginia, the court of primary jurisdiction of said Cause. Section V of this order authorizes the acquisition by the Receivers of title to the coal in the William-Ann and in the Glamorgan mines, respectively, and the entry by the Receivers into the contracts with the respective parties for the extracting, mining, and loading of the coal from these mines for the Receivers.

(2) Certified copy, and two uncertified copies, of Application and Order No. 168, filed on September 17, 1935, in said Court in said Cause. Section V of this order authorizes the acquisition by the Receivers of title to the coal in the Chilton Block No. 1

mine and the entry by the Receivers into the related contract with the party for the extracting, mining, and loading of the coal from this mine for the Receivers.

(3) Three copies of agreement dated May 1, 1934, between United Thacker Coal Company and the Cole & Crane Trustees and Daniel H. Pritchard, certified by Mr. Frank R. Brittain, as Custodian of Contracts for the Receivers of Seaboard Air Line Railway Company, to be a true and correct copy thereof made from an executed counterpart of said agreement.

350 (4) Three copies of memorandum setting forth the plan under consideration by the Receivers prior to the making of the leases and related contracts authorized by the abovementioned Court Order No. 146. The plan set forth in this memorandum was discussed by Col. Anderson, co-Receiver of Seaboard Air Line Railway Company, and me with Mr. Donald R. Richberg, General Counsel of the NRA, at Washington, D. C., in April, 1934, and copy thereof left by us with Mr. Richberg.

Three copies of telegram dated April 28, 1934, from Mr. Richberg to Col. Anderson and three copies of Mr. Richberg's letter to Col. Anderson dated May 4, 1934, confirmatory of that telegram.

Trusting your Commission will find the enclosed papers in order, and requesting that you acknowledge receipt thereof, I am
Yours very truly,

(Sgd.) LEAVEN B. PLUMMER,
General Attorney.

351 INDENTURE OF COAL MINING PLANT & EQUIPMENT LEASE

Near Delbarton, Mingo County, West Virginia

Being Also Coal Lease at Termination of Lease of Same Date to
Receivers of Seaboard Air Line Railway Company

United Thacker Coal Company, Cole & Crane Trustees, Lessors, to Daniel H. Pritchard, Lessee. Dated: May 1st, 1934. Fixed Term: Thirty Years. Renewable: For Thirty Years and Longer.

352 This INDENTURE OF LEASE, Made this 1st day of May Nineteen Hundred and Thirty-four (1934), between the United Thacker Coal Company, a corporation of the State of Maine, and authorized according to the laws of West Virginia to hold property and to do business in that State, on the one hand, and H. Langdon Laws, of Cincinnati, Ohio, Albert H. Cole, of Peru, Indiana, and Charles W. Campbell, of Pickaway, West Virginia, Trustees in joint tenancy under and by virtue of a

certain Declaration of Trust made and entered into on the sixth day of December, Nineteen Hundred and Sixteen (1916), and of record in the office of the Clerk of the Mingo County Court, State of West Virginia, in deed book No. 34, page 290, on the other hand, parties of the first part, hereinafter called the "Lessors," and Daniel H. Pritchard, of Charleston, West Virginia, party of the second part, hereinafter called the "Lessee":

Witnesseth:

PART I. THE COAL MINING LEASE

That in consideration of the sum of One Dollar (\$1.00), the receipt whereof is hereby acknowledged, and the performance and observance of the terms, conditions, covenants, stipulations, and agreements hereinafter set forth to be performed and observed by the Lessee, and reserving as rent the royalties, rentals, and other payments hereinafter provided for, the Lessors do hereby let and lease, but subject to all the terms, provisions, agreements, reservations, and exceptions hereinafter mentioned, to the Lessee, for the term or period of Thirty (30) years from the 1st day of May, Nineteen Hundred and Thirty-four (1934), or to the 1st day of May, Nineteen Hundred and Sixty-four (1964), the sole and exclusive right and privilege of mining and removing coal from what is designated and known locally
 353 as the Upper Thacker vein or seam of coal in, upon, or under the following described boundary or tract of land situate, lying and being in Lee District, County of Mingo, State of West Virginia, on the waters of Pigeon Creek, and bounded and described as follows:

Beginning at a stake in the southern edge and at the mouth of the Rockhouse Fork bearing S. 8 59 E. 90.43 feet to the "U. S. G. S. B. M." set in a rock at the foot of the point between said Rockhouse Fork and Pigeon Creek, which stake is the second corner of the boundary of land described in that certain indenture of Lease from the United Thacker Coal Company to Harvey H. Morris bearing date the first day of May 1920, and recorded in the office of the Clerk of said Mingo County Court in Bonds, Contracts and Leases Book No. 17, page 174, and which will hereinafter be referred to as the Puritan Coal Corporation lease, said Puritan Coal Corporation having by mesne assignments become the owner of said Indenture of Lease; thence running up Rockhouse Fork with the calls of the Puritan Coal Corporation lease as the same have been resurveyed and located by C. M. Poor, Engineer.

1. S. 56 14 E. 838.16 feet to a stake.
2. N. 43 35 E. 1266.18 feet to a stake.

3. N. 83 30 E. 243.83 feet to a double buckeye on the left bank of the creek.

4. S. 20 01½ E. 334.19 feet to an X on a rock near the left edge of the creek.

5. S. 47 35 E. 345.83 feet to an X on a rock 29 feet to the right of a marked chestnut.

6. S. 25 47 E. 314.14 feet to an X on a rock in left edge of the creek.

7. S. 0 15 E. 589.86 feet to a stake on the left bank of the creek.

8. S. 54 17 E. 865.72 feet to an X on a rock on the left bank of the creek.

9. S. 25 48 E. 554.88 feet to a hub on the left bank of the creek.

10. S. 49 54 E. 374.89 feet to a stake.

11. S. 37 07 E. 293.94 feet to a tack in the root of a haw tree.

12. S. 36 22½ E. 209.46 feet to a stake.

13. S. 67 32 E. 327.97 feet to a stake.

14. S. 69 57½ E. 520.47 feet to a stake.

15. N. 87 33 E. 371.43 feet to a stake.

16. N. 59 27 E. 462.63 feet to a stake.

17. S. 84 27 E. 305.18 feet to a stake.

354 18. N. 73 38 E. 324.73 feet to a stake.

19. N. 75 59 E. 265.81 feet to a stake.

20. S. 86 51 E. 549.57 feet to a stake.

21. N. 20 40½ W. 39.02 feet to a stake.

22. S. 72 15 E. 499.00 feet to a stake.

23. N. 80 45 E. 295.00 feet to a stake on the north bank of Rockhouse Fork about 125 feet below the mouth of Fall Rock Branch; thence crossing said Rockhouse Fork and continuing up the south side of Rockhouse Fork, running around the foot of the hill with the Puritan Coal Corporation lease line.

24. S. 23 30 W. 185.00 feet to a stake at the foot of the hill; thence continuing around the foot of the hill with said Puritan Coal Corporation line.

25. S. 78 09 E. 306.44 feet to a stake at the foot of the hill.

26. S. 49 15 E. 164.50 feet to a stake at the foot of the hill witnessed by a 6" willow.

27. S. 29 53 E. 284.48 feet to a blazed 5" poplar on the side of the hill.

28. S. 22 34 E. 176.37 feet to an X on a rock on the side of the hill.

29. S. 48 30 E. 360.00 feet to a stake on the side of the hill witnessed by a 12" leaning apple tree.

30. S. 34 45 E. 139.50 feet to a stake at the foot of the hill, a common corner between said Puritan Coal Corporation leasehold and the leasehold described in that certain Indenture of lease

from the United Thacker Coal Company to the Landstreet Downey Coal Company bearing date the 8th day of December, 1921, and recorded in said Clerk's office in Bonds, Contracts, and leases Book No. 18, page 432; thence leaving the lines of the Puritan Coal Corporation lease and running with the calls of the Landstreet Downey Coal Company leasehold as the same have been resurveyed and located by C. M. Poor, Engineer, crossing said Rockhouse Fork.

31. N. 23 45 E. 578 feet to a stake in the southern edge of the Norfolk & Western Railway Company's right-of-way, being station 687 plus 00 of said right-of-way; thence continuing up said Rockhouse Fork, running with the southern line boundary line of said right-of-way which is the northern boundary line of said Landstreet Downey Coal Company lease.

32. S. 78 10 E. 244.40 feet to a stake.

355 33. N. 82 60 E. 487.35 feet to a stake.

34. N. 61 16 E. 213.69 feet to a stake.

35. N. 40 58 E. 210.20 feet to a stake.

36. N. 33 44 E. 298.70 feet to a stake.

37. N. 48 40 E. 371.00 feet to a stake.

38. N. 67 27 E. 177.80 feet to a stake at station 707 plus 13 of said right of way; thence leaving said right of way, and continuing with the Landstreet Downey Coal Company lease, crossing said Rockhouse Fork.

39. S. 20 01 E. 92.64 feet to a stake in the southern edge of Rockhouse Fork; thence up Rockhouse Fork with its meanders, running with the calls of the Landstreet Downey lease as run by C. M. Poor, Engineer.

40. S. 87 32 E. 45.39 feet to an old hub in the southern edge of the creek above an old splash dam.

41. N. 76 18 E. 340.73 feet to a stake.

42. N. 73 00 E. 593.96 feet to a stake.

43. N. 65 15 E. 559.87 feet to a stake on the north side of Rockhouse Fork bearing N. 65 15 E. 165.00 feet to a hickory stump (buckeye gone) on a cliff, which hickory and buckeye are a common corner to the Trustee's Panhandle Coal & Iron Company feet tract No. 15 and the Thacker Company's Lewis and L. D. Varney mineral tract No. 18 and John P. Justice mineral tract No. 92, which stake is a corner of the Eldee Junior Coal Company, leasehold as the same will hereafter be defined and described; thence leaving said Rockhouse Fork, and running up the hillside on the north side of the creek with said Eldee Junior Coal Company lease line—adopting for the remaining calls of the leasehold boundary a survey made in the spring of 1923 by C. L. Vickers, Engineer, for the joint use of the Thacker Company and the Trustees.

44. N. 23 50 W. 1,470.00 feet to an X in the edge of a large rock on north side of Jusice Hollow (lynn, mulberry, and dogwood called for gone), ninth corner of said John P. Justice mineral tract No. 92; thence running across said Panhandle Coal & Iron tract.

45. N. 56 02 E. 992.99 feet to a large chestnut oak on top of the ridge, on the Elk Creek side thereof, witnessed by four painted hickories, the tenth corner of said Lewis & L. D. Varney Mineral Tract No. 18.

356 46. N. 71 52 E. 2773.39 feet to a set stone between a beech and maple standing on the ridge about 93 feet northeast of where the road crosses the ridge in the gap between Varney Branch and Middle Fork of White Oak Branch; thence continuing up the ridge.

47. N. 68 31 E. 207.40 feet to a chestnut and black oak on the ridge; thence

48. N. 77 30 E. 1256.77 feet to a chestnut oak on the ridge, common corner to the Trustees' Buchanan Tract and the Thacker Company's Lewis and L. D. Varney mineral tract No. 18 and Martha Chafin mineral tract No. 21; thence running across said Buchanan tract.

49. N. 62 56 E. 1634.69 feet to 2 chestnuts on a point on the upper side of Milligan Hollow, the second corner of the Thacker Company's Anderson Cary mineral tract No. 19; thence with the line between said Anderson Cary and Buchanan tract.

50. N. 21 35 E. 909.21 feet to a stake at foot of hill (2 poplar stumps called for).

51. N. 20 37 E. 244.23 feet to a stake in the line of the Arthur White 44 acre survey of October 19th, 1842, witnessed by a beech (beech corner called for gone).

52. N. 62 54 W. 159.14 feet to a set stone a corner to said Arthur White 44 acre survey (beech called for gone); thence

53. N. 67 07 W. 890.56 feet to a stake, bearing S. 53 57 W. 26.31 feet to a white oak, mulberry, dogwood and chestnut corner of the Trustees' Buchanan Tract; thence

54. N. 62 26 W. 1053.00 feet to a white oak stump, a corner of the said Arthur White 44 acre survey; thence

55. S. 52 13 W. 120.27 feet to a stake by the creek (birch and dogwood called for gone); thence

56. N. 16 50 E. 2782.77 feet to a large sycamore and 3 beeches, the ninth corner of the Thacker Company's W. A. Farley mineral tract No. 23; thence with the back or northern calls of said Thacker Company's W. A. Farley mineral tract No. 23, Thos. B. Farley mineral tract No. 24, William Curry mineral tract No. 25 and S. F. Curry mineral tract No. 26.

57. N. 5 16 W. 679.79 feet to a gum and poplar on a bench, beech witness; thence

58. N. 67 25 W. 471.21 feet to a black pine on a point, witnessed by a small white oak; thence

59. N. 2 28 W. 821.50 feet to a chestnut oak in the head of a hollow; thence

357 60. S. 77 13 W. 1386.66 feet to three black oaks on a point (one down); thence

61. N. 15 43 W. 600.06 feet to a dogwood and large red oak in a hollow below a rock cliff; thence around the hillside down Elk Creek.

62. S. 73 11 W. 1291.04 feet to a black oak 18 inches in diameter on a point 50 feet below a small cliff; thence

63. N. 5 26 W. 431.89 feet to a double chestnut oak in the head of a drain; thence continuing down said creek around the hillside.

64. S. 49 44 W. 1068.25 feet to a small white oak and pine stump on the bank of creek, a corner to said Thos. B. Farley mineral tract No. 24; thence with the calls of said Thos. B. Farley tract reversed.

65. N. 28 59 E. 517.68 feet to a small set stone in the head of a hollow witnessed by an elm and a tripple butternut; thence

66. S. 75 29 W. 670.41 feet to a stake on hillside (black oak called for); thence

67. N. 27 33 W. 802.33 feet to a dogwood and two beeches witnesses (white oak called for gone); thence

68. N. 57 55 W. 661.93 feet to a stake in a cleared field (beech called for gone); thence

69. N. 35 05 E. 330.01 feet to a stake (white oaks called for gone); thence

70. N. 63 32 W. 774.87 feet to a spruce pine stump near the mouth of a hollow of Five Mile Fork; thence

71. N. 7 32 E. 581.82 feet to a beech and maple on hillside; thence

72. N. 86 09 W. 1758.60 feet to a cucumber (down) with two hickories, gum and dogwood witnesses 18 feet from a rock; thence

73. S. 32 50 W. 1804.61 feet to a black walnut corner of said William Curry mineral tract No. 25 and with call of same.

74. N. 14 41 E. 1164.50 feet to a black oak on a ridge below a cliff, beginning corner to said S. F. Curry mineral tract No. 26, and with the calls of same.

75. N. 36 37 W. 2892.31 feet to two beeches on the east bank of Hurricane Branch and at the forks of same.

76. N. 89 52 W. 326.06 feet to a dogwood and rock witnessed by a dogwood and beech.

77. S. 8 18 W. 1,072.96 feet to a large beech.

78. S. 21 56 E. 231.46 feet to a gum.
79. S. 23 31 W. 613.83 feet to a white oak.
- 358 80. S. 76 30 W. 338.01 feet to a black oak on the side of a point.
81. N. 82 37 W. 642.78 feet to a red oak stump and a beech.
82. S. 86 44 W. 659.27 feet to a hickory and black jack.
83. S. 8 05 W. 185 feet to a stake, being the "two Beeches" corner called for as the tenth corner of said S. F. Curry mineral tract No. 26; and continuing with the lines of said tract.
84. S. 69 37 E. 325.43 feet to a stake (white oak and beech called for).
85. S. 35 48 W. 235.36 feet to a stake on the south bank of Elk Creek (Sassafras called for), and down Elk Creek.
86. S. 49 44 W. 298.20 feet to a stake on creek bank.
87. S. 4 24 W. 218.72 feet to a stake.
88. S. 24 26 E. 281.21 feet to a stake between two beeches on a small bench.
89. S. 76 21 W. 517.12 feet to a stake bearing S. 84 W. 20 feet to a poplar stump witnessed by a butternut.
90. S. 43 05 W. 301.34 feet to a cucumber witnessed by a beech, dogwood, and hickory.
91. S. 18 56 W. 213.92 feet to a hickory on the ridge witnessed by a chestnut; then running up said ridge.
92. S. 70 15 E. 888.50 feet to a small service on a cliff (locust called for gone).
93. S. 53 20 E. 281.85 feet to a chestnut oak on the ridge.
94. N. 86 12 E. 76.98 feet to a chestnut oak snag on a cliff, a corner of said William Curry Mineral Tract No. 25 and with one call of same.
95. S. 15 02 E. 2173.50 feet to a stake on a knob (chestnut oak called for gone) witnessed by two chestnut oaks, maple and black oak; thence
96. S. 49 30 W. 612.00 feet to a large black gum on center of ridge between Elk Creek and Millstone Branch of Pigeon Creek, witnessed by two cucumbers and a poplar, corner to the Trustees' lands, and with the northern lines of same.
97. N. 55 54 W. 2439.43 feet to two chestnut oaks on northern edge of ridge witnessed by a white oak; thence continuing down said ridge.
98. S. 78 18 W. 765.59 feet to two chestnut oak stumps on a high knob witnessed by two black oaks and three bunches of chestnut sprouts; thence leaving said ridge between Millstone Branch and Elk Creek and running down on the Elk Creek side.
- 359 99. N. 26 35 E. 790.73 feet to a stake in a stone pile on a bench in a field (beech and sugar tree stumps called for

gone) witnessed by two apple trees bearing S. 40 30 W. 17 feet and N. 31 45 W. 28 feet; thence

100. N. 30 03 W. 431.53 feet to two lynns on a point; thence

101. S. 81 56 W. 374.88 feet to a gum and white oak stags on a point; thence

102. S. 30 29 W. 703.76 feet to two lynns (one down) in head of a hollow, witnessed by a beech; thence

103. N. 47 54 W. 639.33 feet to a beech and white oak stump by and just below a fence; thence

104. S. 53 48 W. 461.38 feet to a leaning beech on the west side of a point; thence

105. S. 31 33 W. 602.15 feet to a beech in the head of a hollow (dogwood gone); thence

106. N. 73 13 W. 613.83 feet to a stake in a stone pile; thence

107. N. 55 43 W. 77.28 feet to a stake in a stone pile on a knob; thence

108. N. 18 23 W. 306.26 feet to a white oak and hickory (hickory fallen) on a point, corner to a four acre tract; thence

109. N. 32 29 W. 769.58 feet to a stake in Elk Creek (double Sycamore called for) corner Harvey Curry; thence running down Elk Creek with its meanders, and cutting through said Trustees' B. R. Bias Trustee 264.6 acre tract.

110. S. 46 34 W. 687.79 feet to a stake; thence

111. N. 73 00 W. 193.80 feet to a stake; thence

112. N. 25 00 W. 1014.55 feet to a stake at the mouth of Elk Creek; thence running up Pigeon Creek with its meanders.

113. S. 27 01 W. 704.20 feet to a stake.

114. S. 15 21 E. 940.90 feet to a stake; thence leaving said Pigeon Creek and running up the hillside on the East side of Pigeon Creek with the outside lines of the Trustees' tracts as said lines run around Millstone Branch.

115. S. 76 05 E. 430.60 feet to a set stone (beech called for).

116. S. 76 14 E. 494.12 feet to a set stone.

117. N. 53 21 E. 198.36 feet to a stake witnessed by a beech, black oak and dogwood.

118. S. 57 49 E. 2635.36 feet to a set stone on the south bank of Millstone Branch (three beeches and buckeye stump called for).

360 119. S. 81 11 W. 1,730.73 feet to a set stone where a hickory stood on side of point, witnessed by a dogwood, black oak and beech.

120. S. 64 19 W. 1,364.35 feet to two white oaks on a ridge, witnessed by a sugar tree, a corner to the Trustees' B. R. Bias Trustee et al. 584.4 acre tract, also the fifth corner of the Thacker Company's P. A. Farley mineral track No. 16; thence leaving the

lands of the Trustees and running with two calls of said mineral tract No. 16.

121. S. 23 30 W. 1,219.67 feet to a stake on the Norfolk & Western Railway Company's right of way, near the bank of Pigeon Creek, white oak called for; thence running up Pigeon Creek.

122. S. 65 11 E. 184.64 feet to a stake at the mouth of Dark Hollow, a corner to the Thacker Company's Celia A. Farley fee tract No. 134; thence with one call of said last mentioned tract reversed.

123. S. 43 30 W. 48.28 feet to a stake near the center of Pigeon Creek opposite the mouth of Dark Hollow; thence up the east bank of Pigeon Creek.

124. S. 48 45 E. 637.43 feet to a stake in the east edge of creek.

125. S. 16 15 E. 488.00 feet to a stake on east side of creek.

126. S. 9 26 W. 499.80 feet to a stake at the mouth of a hollow.

127. S. 22 05 W. 538.42 feet to a stake in the east edge of creek.

128. S. 2 44 E. 497.25 feet to a stake in the east edge of the creek.

129. S. 48 41 E. 224.00 feet to a stake in the east edge of the creek, witnessed by a steel rail set in concrete bearing N. 67 10 E. 284.40 feet.

130. S. 69 17 E. 665.50 feet to a stake in the east edge of the creek.

131. S. 58 25 E. 511.65 feet to a stake in the east edge of the creek.

132. S. 36 05 E. 591.00 feet to the beginning, and containing 4,995.06 acres from which there is excluded a tract of land situate and lying on both sides of the Fall Rock Branch of Rockhouse Fork and bounded and described as follows, to wit:

Beginning on a spruce pine stump standing on the northeast side of said Fall Rock Branch, about 525 feet up the same, witnessed by a buckeye and black oak, said spruce pine stump being a corner of the Hiram McCoy 175 acre survey dated February 16th, 1849, and a corner of the Thacker Company's Jas. M. Curry fee tract No. 17; thence crossing said Fall Rock Branch, and running around the hillside down said Rockhouse Fork.

361 1. N. 87 47 W. 671.71 feet to a white oak and beech; thence continuing around the hillside and down Rockhouse Fork.

2. N. 65 01 W. 449.81 feet to an X on a rock on the east side of a hollow (lynn and dogwood called for) witnessed by an elm, white oak, ash, and walnut; thence continuing around the hillside.

3. S. 77 51 W. 756.36 feet to a white oak on a point opposite the house in which Stanley Vernatter now lives, witnessed by a black oak; thence running up the hillside.

4. N. 3 29 E. 1557.91 feet to a set stone on the west side of a point on the lower side of a bench, witnessed by two small black oaks, two small chestnut oaks, and a 10 inch white oak; thence running around the hillside up said Rockhouse Fork, crossing said Fall Rock Branch,

5. S. 75 54 E. 3195.56 feet to a beech and gum in the head of a drain,

6. S. 54 56 W. 1449.68 feet to the beginning, and containing 69 acres, more or less,

leaving embraced in the aforesaid leasehold, after deducting said 69 acres exclusion, Four Thousand, Twenty-six and Six one-hundredths (4,026.06) acres which is hereby leased and let, which said 69 acre tract, however, shall be added to said 4,026.06 acre leasehold boundary, subject to all and several the terms and provisions of this indenture, if, as and when (it still being economically feasible to mine and remove the coal underlying said 69 acre tract in connection with that underlying said leasehold boundary) said 69 acre tract has been redeemed or acquired by the United Thacker Coal Company from the State of West Virginia;

Subject, nevertheless, to such rights of way and easements as the Lessors, or either of them, have heretofore granted to the Norfolk & Western Railway Company, the Appalachian Electric Power Company, and or to the State of West Virginia and any of its political or governmental subdivisions,

362 Said leasehold boundary is composed of various and sundry tracts and parts of tracts of lands and minerals now owned in severalty by the said United Thacker Coal Company and the said Trustees, respectively, in fee simple absolute as follows:

TRACTS OWNED BY THE UNITED THACKER COAL COMPANY

First tract: So much of that certain tract described in the deed from Celia A. Farley and husband to the United Thacker Coal Company, bearing date the 30th day of April 1904, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 15, page 242, as lies on the east side of main Pigeon Creek, and estimated to contain 40 acres.

Second tract: So much of that certain tract described in the deed from P. A. Farley et al. to James E. Price, Trustee, bearing date the 28th day of March 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book L, page 195, as lies on the east side of Pigeon Creek and on the north side of Rockhouse Fork, and estimated to contain 290 acres.

Third tract: So much of that certain tract described in the deed from W. J. McCoy et al. to Arthur D. Bright, Trustee,

bearing date the 3rd day of September 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book L, page 297, as lies on the north side of Rockhouse Fork, and estimated to contain 300 acres.

Fourth tract: So much of that certain tract described in the deed from John B. Floyd and wife to Henry A. Phillips, Trustee, bearing date the 4th day of April 1892, and recorded in the office of the clerk of the Logan County Court in Deed Book M, page 227, as lies on the north side of Rockhouse Fork, and estimated to contain 22 acres.

Fifth tract: So much of that certain tract described in the deed from James M. Curry and wife to Arthur D. Bright, Trustee, bearing date the 4th day of September 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book O, page 199, as lies north of calls 22 to 35, both inclusive, of the above described leasehold boundary.

Sixth tract: Situate on the north side of Rockhouse Fork and adjoining the next above described tract of land on the east, being the same tract described in the deed from John P. Justice and wife to William Kronenwett bearing date the 13th day of February 1901, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 8, page 46, and containing in its entirety 73.27 acres from which there is excepted, however, a strip of land lying between the Norfolk & Western Railway's right-of-way and Rockhouse Fork and extending for length from said Railway Company's station No. 697 plus 66 to station No. 707 plus 13.

Seventh tract: Situate on the Skin Poplar Hollow of Elk Creek, and on both sides of the Middle Fork of Elk Creek, 363 to the north of the last above-described tract, and being the same tract of land described in the deed from Martha Chafin, widow, to Henry R. Phillips, Trustee, bearing date the 20th day of March 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book N, page 354, and containing 231 acres, more or less.

Eighth tract: Situate on the left hand side of the Right Fork of Elk Creek, to the west of the tract last above described, and being the "4th TRACT" described in the deed from William Straton and wife to Egbert Mills, Jr., Trustee, bearing date the 24th day of April 1890, and recorded in the office of the clerk of the Logan County Court in Deed Book L, page 419, and containing 199.5 acres, more or less.

Ninth tract: Situate on both sides of Elk Creek, to the north of the two tracts next preceding, and being the same tract described in the deed from William A. Farley and wife to Henry R. Phillips, Trustee, bearing date the 29th day of March 1889,

and recorded in the office of the clerk of the Logan County Court in Deed Book N, page 363, and containing 512 acres, more or less.

Tenth tract: Situate on both sides of Elk Creek, to the west of the tract next preceding, and being the tract described in the deed from Thomas B. Farley and wife to Henry R. Phillips, Trustee, bearing date the 29th day of March 1889, and recorded in the office of the clerk of the Logan County Court in Deed Book L, page 159, and containing 307 acres, more or less.

Eleventh tract: Situate on both sides of Elk Creek and of the Laurel Branch thereof, to the west of the tract next preceding, and being the same tract described in the deed from William Curry and wife to Arthur D. Bright, bearing date the 12th day of September 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book L, page 295, and containing 398.75 acres, more or less.

Twelfth tract: Situate on both sides of Elk Creek, to the north and northwest of the tract next preceding, and being the same tract described in the deed from Samuel F. Curry and wife to Henry R. Phillips, Trustee, bearing date the 25th day of March 1889, and recorded in the office of the Clerk of the Logan County Court in Deed Book L, page 157, and containing 229 acres, more or less.

Thirteenth tract: Situate on the north side of said Rockhouse Fork, between the second and third tracts above described, and being the same tract described in the deed from Lula Curry and W. J. Curry, her husband, to the said United Thacker Coal Company bearing date the 12th day of July 1922, and recorded in the office of the Clerk of said Mingo County Court in Deed Book No. 45, page 530, and containing 15 acres, more or less.

TRACTS OWNED BY THE COLE & CRANE TRUSTEES

First tract: Situate on the north side of Rockhouse Fork, adjoining the United Thacker Coal Company's third and fourth tracts above described, and being "Tract No. 5" in the deed from John H. Holt et al. to James O. Cole et al. bearing date the 16th day of November 1908, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 22, page 535, and containing 199 acres, more or less.

364 Second tract: Situate above and on the head of the

Fall Rock Branch of Rockhouse Fork and the head of the Millstone Branch of Pigeon Creek, and being "Tract No. 4" described in said last mentioned deed, and containing 244.50 acres more or less, from which is excepted, however, a triangular parcel

of land on the right hand side of the John P. Justice Branch containing 16.22 acres, more or less.

Third tract: Situate on the head of the Right Fork of Elk Creek, adjoining the tract last above described, and being the same tract described in the deed from S. S. Altizer, Trustee, et al. to James O. Cole et al., bearing date the 9th day of June 1906, and recorded in said clerk's office in Deed Book No. 18, page 371, and containing 195 acres, more or less.

Fourth tract: Situate on a right-hand fork of the Right Fork of Elk Creek, adjoining the tract last above described, and being "Tract No. 3" described in the aforesaid deed from John H. Holt et al., to James O. Cole et al., and containing 83.75 acres, more or less.

Fifth tract: Situate on a right-hand fork of the Right Fork of Elk Creek, adjoining the tract last above described on the west, and being "Tract Number Four" described in the deed from Henry A. McCarthy, Trustee, to James O. Cole et al., bearing date the 7th day of April 1908, and recorded in said Clerk's Office in Deed Book No. 22, page 197, and containing 61 acres, more or less.

Sixth tract: Situate on the Harden Branch of Elk Creek, to the north of the tract last above described, and being the tract described in the deed from James A. Farley and wife to James O. Cole et al., bearing date the 6th day of June 1912, and recorded in said clerk's office in Deed Book No. 27, page 114, and containing 70.27 acres, more or less.

Seventh tract: Situate on Millstone Branch of Pigeon Creek, adjoining on the west the second tract of the said Real Estate Trust hereinabove described, and being "Tract Number Two" described in the deed from B. R. Bias, Trustee, et al. to James O. Cole et al., bearing date the 16th day of May 1908, and recorded in said clerk's office in Deed Book No. 22, page 225, and containing 584.4 acres, more or less.

Eighth Tract: Situate on the ridge between said Millstone Branch and the Johnson McCoy Branch of Rockhouse Fork, adjoining on the south the tract last above described, and being "Tract No. Two" in the aforesaid deed from Henry A. McCarthy to James O. Cole et al., and containing 34 acres, more or less.

Ninth tract: Situate on the crest of the ridge between said Millstone Branch and Elk Creek, adjoining on the north the seventh tract of said Real Estate Trust, and being the tract described in the deed from Joseph F. Paull et al. to James O. Cole et al., bearing date the 25th day of May 1908, and recorded in said office in Deed Book No. —, page —, and containing 10.8 acres, more or less.

Tenth tract: Situate on the ridge between said Millstone Branch and Elk Creek, adjoining on the north the "Seventh Tract" of said Real Estate Trust hereinabove described, and being "Tract Number One" described in the aforesaid deed from Henry A. McCarthy, Trustee, to James O. Cole et al., and containing 67 acres, more or less.

365 Eleventh tract: Situate on the ridge between said Millstone Branch and Elk Creek, adjoining on the west the last above described tract, and being "Tract No. 2" described in the aforesaid deed from John H. Holt et al. to James O. Cole et al., and containing 65.39 acres, more or less.

Twelfth tract: Situate on the forks of Pigeon Creek and Elk Creek, adjoining on the west the last above tract, and being so much of "Tract No. 1" described in the aforesaid deed from B. R. Bias, Trustee, et al. to James O. Cole et al., as lies on the south side of Elk Creek and on the east side of Pigeon Creek, and estimated to contain 50 acres.

Thirteenth tract: Situate on both sides of the Middle Fork of Elk Creek, between the United Thacker Coal Company's Anderson Cary 119 acre mineral tract No. 19 and said Company's seventh tract hereinabove described, and being the tract described in the deed from John H. Holt et al. to James O. Cole et al., bearing the date 4th day of May 1907, and recorded in said Clerk's office in Deed Book No. 20, page 499, and containing by resurvey 79.11 acres, more or less, from which is excepted, however, 14.79 acres off of the southeastern corner of said tract.

Also the right and privilege of making said coal into coke and other products of coal, and of preparing for market, using, transporting, shipping, and selling said coal and coke and other products of coal.

Also the privilege of occupying and using so much of the surface of certain lands, and of using so much of the stone, sand, water, and timber therein and thereon, and of making therein and thereon such excavations and improvements of whatever nature, as may be necessary in the proper exercise and enjoyment of the rights and privileges herein let and leased, but for no other purpose, said certain lands being the following tracts or parcels of land, lying and being in the County of Mingo, State of West Virginia, on the waters of Pigeon Creek, and bounded and described as follows:

UNITED THACKER COAL COMPANY'S SURFACE TRACTS

First tract: Being the same as the "First Tract" of said company hereinbefore stated as being embraced in the above-described leasehold boundary, subject, however, to the right of the United

Thacker Coal Company to use the bottom and rolling lands on the east side of Pigeon Creek, both above and below the Irve Hollow in connection with any operations said company or its assigns may conduct on said Rockhouse Park and Pigeon Creek.

366 Second tract: Situate on the east of and adjoining the tract next above described, and being the tract described in the deed from J. K. Anderson and wife to the United Thacker Coal Company bearing date the 27th day of June 1906, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 19, page 14, and containing 10.12 acres, more or less, and overlying a part of the "Second Tract" of said company hereinbefore stated as being embraced within the leasehold boundary.

Third tract: Being the same as the "Thirteenth Tract" of said company hereinbefore stated as being embraced in the above-described leasehold boundary.

Fourth tract: A tract of 60.78 acres situate on the north side of said Rockhouse Fork, on the Pemberton Branch thereof, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the leasehold boundary, it being the "First Tract" described in the deed from Lulu Curry and W. J. Curry, her husband, to the United Thacker Coal Company bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 527, subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained.

Fifth tract: A tract of 114.03 acres situate on the north side of said Rockhouse Fork, and on the Johnson McCoy Branch thereof, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the leasehold boundary, it being the same tract of land described in the deed from Boyd Maynard and wife to the United Thacker Coal Company bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 538; subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained.

Sixth tract: A tract stated as containing 25 acres, but in fact containing only about one-half said number of acres, situate on the south side of Rockhouse Fork, overlying a part of the "Second Tract" hereinbefore stated as being embraced in the above-described Leasehold boundary, and being the same tract described in the deed from Rockhouse Land Company to the United Thacker Coal Company bearing date the 15th day of February 1922, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 45, page 533; subject, nevertheless, to

all the reservations, exceptions, and conditions in said deed set out and contained.

Seventh tract: A tract containing 59.34 acres, situate on both sides of Rockhouse Fork, adjoining the Fourth, Fifth, and Sixth Tracts next above-described, and overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, being the "Second Tract" described in the above-mentioned deed from Lula Curry and W. J. Curry, her husband, bearing date the 12th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 527, subject, nevertheless, to all the reservations, exceptions, and conditions in said deed set out and contained, and specifically excepting such rights as were conveyed by the United Thacker Coal Company to John

367 Maynard by deed bearing date the 10th day of April 1923, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 48, page 117, in a tract containing 3.5 acres, more or less, and situate along the south bank of Rockhouse Fork opposite the Pend and Johnson McCoy Branches, and lying within said 59.34 acre tract.

Eighth tract: A tract containing 54.72 acres, situate on the south side of said Rockhouse Fork, to the southeast of and adjoining the next preceding tract, likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, it being the same tract of land described in the deed from Wade H. Bropson, Special Commissioner, to the United Thacker Coal Company bearing date the 13th day of July 1922, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 45, page 525, and likewise in the deed from James A. Farley and wife to the United Thacker Coal Company bearing date the 13th day of July 1922, and recorded in said office in Deed Book No. 45, page 523; subject nevertheless, to all the reservations, exceptions, and conditions in said two deeds set out and contained.

Ninth tract: A tract containing two acres, more or less, situate on the north side of Rockhouse Fork, and likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, conveyed to the United Thacker Coal Company by John Maynard and wife by deed bearing date the 10th day of April 1923, and recorded in the office of the clerk of the Mingo County Court in Deed Book No. 48, page 105.

Tenth tract: So much of that certain tract, likewise overlying a part of the "Third Tract" hereinbefore stated as being embraced within the above-described leasehold boundary, that was conveyed to the United Thacker Coal Company by John Maynard and

wife by deed bearing date the first day of October 1919, and recorded in the office of the Clerk of the Mingo County Court in Deed Book 38, page 579, as lies on the north side of said Rockhouse Fork, and containing 18.28 acres, more or less.

Eleventh tract: Being the same as the "Fourth Tract" of said Thacker Company hereinbefore stated as being embraced within the above-described leasehold boundary.

Twelfth tract: Being the same as the "Fifth Tract" of said Thacker Company hereinbefore stated as being embraced within the above-described leasehold boundary.

Thirteenth tract: Situate on the headwaters of the Right Fork of Elk Creek, and being the tract described in the deed from James R. Danron et al. to William Kronenwett, bearing date the 9th day of February 1901, and recorded in the office of the Clerk of the Mingo County Court in Deed Book No. 7, page 107, the boundary lines of which are coterminous, or nearly so, with the boundary lines of the "Eighth Tract" of said United Thacker Coal Company hereinbefore stated as being embraced within the above-described leasehold boundary, and containing 206.5 acres, more or less.

368 Provided, however, that the rights given the Lessee with respect to the use of the surface of the "Sixth" and "Eighth" tracts last hereinabove described, as well as of such portion of the "Seventh" tract last hereinabove described as lies on the south side of said Rockhouse Fork, shall be limited and restricted to the bottom land lying along the south bank of said Rockhouse Fork, and to such hillside land contiguous to said bottom land as is adapted to and suitable for building purposes; it being understood and agreed, however, that the United Thacker Coal Company reserves to itself, its successors, and assigns the right to mine coal from under but not to prepare or handle the same upon said bottom and contiguous hillside land, including specifically the right to drive air courses and drainage and timber holes from under the ground out to the surface, with rights of ingress, egress, and regress to said air courses and drainage and timber holds and the further right to maintain thereon the electric transformer station now located thereon, the rights thus reserved to not unreasonably interfere, however, with any miners' houses and appurtenant buildings which the Lessee, his heirs, successors and assigns may have erected upon said bottom and contiguous hillside land.

And provided, moreover, that the rights given the Lessee under this paragraph shall be subject to the terms of that certain indenture of writing from the United Thacker Coal Company to the Puritan Coal Corporation bearing date the 20th day of July 1922, and recorded in the office of the Clerk of the Mingo County

Court in Bonds, Contracts and Leases Book No. 19, page 246, wherein and whereby there was let and leased unto said Puritan Coal Corporation certain rights and privileges with respect to a tract of land situate on the north side of Rockhouse Fork which is more particularly bounded and described, as follows, to wit:

"Situate between stations 623 and 650 of the center line of the Norfolk & Western Railway Company's right of way, and extending from the center of Rockhouse Fork between 369 radial lines drawn through said respective right of way stations back to points on the hillside north of Rockhouse Fork so as to embrace within said parcel of land all the bottom and contiguous hillside land, within the limitations herein defined, that is adapted to side-track, plant and general building purposes:"

there being let and leased hereby to the Lessee, however, all rights reserved to the United Thacker Coal Company in said indenture of writing of July 20, 1922, to the Puritan Coal Corporation, and in particular the right to mine the coal from under but not to prepare and handle the same upon said last described tract of land, and the right to drive air courses and drainage and timber holes from under the ground to the surface, with rights of ingress, egress, and regress to said courses and holes, insofar as the exercise of said rights do not unreasonably interfere with the uses to which the said Puritan Coal Corporation, its successors, and assigns, are by said indenture of writing authorized to put the surface of said tract or parcel of land.

THE COLE & CRANE TRUSTEES' SURFACE TRACTS

The "First" to the "Twelfth" tracts, both inclusive, of said Real Estate Trust hereinbefore described as being embraced within the principal leasehold boundary.

And the Lessee shall not have any right to use the surface of any other lands than those next above described for the exercise, use, and enjoyment of the rights and privileges herein let and leased, or for any of his operations under this Lease, except always that the Lessee shall have the right of using, in connection with his operations hereunder, such surface and mining rights as belong to any mineral tract included in the leasehold boundary first hereinbefore in this Part I of this indenture described.

Excepting and reserving, however, on all of the lands 370 hereinabove described, all boundary, corner, or line trees, and all trees which may be selected and designated as provided in Article Sixteen hereof.

And Excepting and Reserving, moreover, to the United Thacker Coal Company, from the timber on the "Eighth Tract" hereinbefore listed and described under the topical heading "Tracts Owned by the United Thacker Coal Company" all trees which at the date of this lease measure sixteen (16) inches or over in average diameter over the bark three (3) feet from the ground on the upper side of the tree. And except further that the right and privilege given by this indenture to the Lessee to use timber as hereinbefore specified is subject to the right of the Lessors, their respective vendees, grantees, and assigns, which right is hereby reserved to them respectively, to cut and use from and of said timber such hickory, beech, buckeye, and lynn trees, which at the date of cutting measure less than twelve (12) inches in average diameter over the bark three (3) feet from the ground, as the Lessors, their respective vendees, grantees, or assigns, may desire for haulroads, tramroads, haulways, skidways, and backing, necessary, proper, or convenient in cutting and removing the timber not included in this lease and any and all other timber upon any of the lands now owned or claimed by the Lessors in Mingo and Logan Counties, West Virginia, and also the beech below twelve (12) inches in average diameter, measured over the bark three (3) feet above the ground at the time of cutting, for the purpose of constructing tramroads, tramways, and other necessary roads and ways in connection with any logging operation that the Lessors or their respective vendees, grantees, or assigns, may conduct upon any of the lands now owned or claimed by the Lessors, respectively, or that they may acquire from third parties in Mingo County, West Virginia.

371 It is understood and agreed that the rights and privileges herein let and leased are limited to such rights and privileges as the respective Lessors possess and have the lawful right to let and lease; and where the Lessors own the minerals and appurtenant rights only, this lease does not let and lease any rights and privileges whatsoever other than such as are granted to the respective Lessors in and by the deeds under which they respectively claim the said minerals and appurtenant rights; and this lease is made subject to any and all exception and reservations contained in any of said deeds.

And it is understood and agreed that all of the coal in said vein or seam of said leasehold boundary which can be mined and removed hereunder shall be mined and removed by the Lessee; and if at the expiration of said period of Thirty (30) years the Lessee has not mined and removed all of said coal, then this lease shall be extended and renewed for a period of Thirty (30) years upon the same terms, conditions, covenants, stipulations, and

agreements herein contained, and subject to the payment of the same royalties, rentals, and other payments herein reserved and provided for, and shall be further renewed for a like period from time to time and in the same manner until all of said coal has been mined and removed; and whenever during said original period of Thirty (30) years or any extension or renewal thereof, the Lessee shall have mined and removed all of said coal and shall have paid to the Lessors all royalties, rentals, and other payments due or accruing hereunder, this lease shall cease and determine; and all the terms, conditions, covenants, stipulations, and agreements, royalties, rentals, and other payments contained and reserved herein, shall refer to all of said vein or seam and the coal mined or to be mined therefrom.

Excepting and Reserving to the Lessors, respectively, as their several interests and ownerships appear, the entire ownership and control of all the lands herein described, and the coal, stone, sand, water, timber, and other minerals, products, and substances therein and thereon, for all purposes except those hereinbefore expressly set forth, which exception and reservation shall include, but not as a limitation thereof, the right and privilege of using, selling, or otherwise disposing of, any surface not occupied by the Lessee hereunder, and of letting leases to tenants for the purpose of occupying and farming said surface; the right and privilege of searching for, mining, and removing coal from any and all veins or seams, or portion or portions thereof, the right and privilege of mining which is not herein expressly let and leased, or which the Lessee may not elect to mine under Article Eight hereof; the right and privilege of making coke and other products of coal, and of preparing for market, using, transporting, shipping, and selling coal and coke and other products of coal; the right and privilege of growing timber and of cutting, preparing, using, or removing any timber the right and privilege of using which is not herein expressly let and leased; the right and privilege of searching for oil, gas, or any other minerals, products, or substances and removing the same when found; the right and privilege of draining water, transmitting electrical energy, and transporting coal or coke, or other products of coal, timber, oil, gas, or other minerals and products and materials and goods of all other kinds, from said lands, or any other lands, over, across, or through the lands herein described; the right and privilege of using the stone, sand, water, and material in and on said lands, of making excavations and sinking or boring slopes, shafts, drifts, tunnels, and wells, of erecting buildings, structures, machinery, and improvements, of constructing ditches, transmission lines, railroads, or other roads, tramways, tubing, pipe lines, or other means of

drainage, transmission, or transportation, over, upon, or beneath the surface of said lands, and of selecting and granting
 373 rights of way therefor, together with full and free rights of ingress and egress, as may be necessary or convenient in the proper development of the same or other lands, or in the proper exercise of the rights and privileges hereby excepted and reserved; and the right to grant and convey from time to time to any railroad or railway company so much of the lands herein described as may be required by said railroad or railway company for rights of way or other railroad or railway purposes; and any or all of said rights and privileges shall inure to the benefit of and may be exercised and enjoyed by the respective lessors and their assigns and their other lessees or other agents or attorneys: Provided, however, That the rights and privileges hereby excepted and reserved shall be exercised with due regard for the requirements, convenience, and safety of the operations hereunder, and that the Lessee hereunder shall be properly compensated for any actual damage accruing to him in the exercise of any of the rights and privileges hereby excepted and reserved; such damage, in case of the inability of the parties to agree as to the amount thereof, to be determined by arbitration under Articles Thirty-five of this indenture.

This Part I of this Indenture of Lease is subject to the following terms, conditions, covenants, stipulations, and agreements which the Lessee covenants to and with the Lessors faithfully to perform and observe, viz:

Article One: The Lessee shall begin work under this lease on or before the first (1st) day of May, Nineteen Hundred and Thirty-four (1934), and shall at all times energetically open, develop, and keep up his operations in order that, so long as fair prices are obtainable, his capacity for mining coal and preparing and shipping coal or coke or other products of coal shall be sufficient to meet the demands and requirements of the market,

to the extent that the same can reasonably be done hereunder.

374 Article Two: The Lessee shall pay to the Lessors, as rent, a royalty of nine (9c) cents for each and every net ton of two thousand (2,000) pounds of coal mined hereunder during the first six (6) years of this indenture, and ten (10c) cents per net ton thereafter.

The Lessee shall, on or before the 20th day of each calendar month, furnish to the Lessors, their agents or attorneys, a report showing the quantity of coal mined hereunder during the calendar month immediately preceding, using the weights furnished by the railroad company over whose road the coal is shipped for all coal so mined and shipped by rail, and incorporating into such report the car numbers of the railroad cars in which such coal

is shipped, and the weights of said cars as furnished Lessee by the railroad company; the Lessee hereby authorizing and requesting any such railroad company to exhibit to Lessors, their agents and attorneys, any books and records showing the detail weight, quantity, and other pertinent information relating to the coal thus shipped, whenever demand is made upon it therefor by Lessors during business hours. If any coal shall be mined and not shipped by rail, the quantity thereof shall be ascertained in a manner satisfactory to the Chief Engineer of the Lessors, and reported to Lessors for the same period and as at the same date as is hereinbefore provided in the case of coal shipped by rail.

Should any question arise between the Lessors and the Lessee as to the reasonableness of any rule or regulation that may be prescribed by the Chief Engineer of the Lessors under this Article, the Lessee may submit such question to arbitration under Article Thirty-five of this indenture.

Article Three: The Lessee shall pay to the Lessors, as a minimum annual rental under this Part I of this indenture, without regard to the quantity of coal mined by him, for the remainder of the calendar year 1934 the sum of Eight Thousand Dollars (\$8,000.00), and for each calendar year thereafter during the continuance of this lease the sum of Sixteen Thousand Two Hundred Dollars (\$16,200.00) except as herein-after provided in this Article. All such minimum annual rentals shall be paid in quarterly installments according to the provisions of Article Thirty-one hereof, and the word "rentals" as used in said last-named Article shall include all said minimum annual rentals. If the amount of such tonnage royalties for any quarter exceed the minimum annual rental to be paid for such quarter, then only such excess shall be paid in addition to the payment of the minimum annual rental for such quarter. Whenever in any year the tonnage royalty on coal mined in any quarter thereof is less than the minimum annual rental for such quarter, and in any other quarter of the same year the tonnage royalty on coal mined is in excess of the minimum annual rental for such quarter, the shortage of one quarter shall be applied as a credit or offset against the excess of another quarter, so that if the tonnage royalties on all the coal mined during the year do not exceed the minimum annual rental for said year, the accounts for the different quarters shall be so adjusted that the Lessee will not have to pay more than the minimum annual rental for such year; but nothing herein contained shall be construed to give the Lessee the right to pay less in any year than the minimum annual rental for such year, or to pay less in any year than the equivalent of the tonnage royalties for all coal mined in such year, or to apply the tonnage royalties paid in one year as a credit on any

of the minimum annual rental to be paid for any succeeding year or quarter thereof. But if the Lessee shall fail in any year to mine a sufficient number of tons of coal to make the tonnage royalty thereon equal the minimum annual rental for such year, then the said Lessee may, in the next succeeding two years, but not afterwards, and upon paying the minimum annual
 376 rental, mine free of said tonnage royalties a sufficient number of tons of coal to make up such deficiency without any charge for interest, provided always that nothing herein contained shall affect or reduce the amount of minimum annual rental to be paid by the Lessee for each quarter of each year as hereinbefore provided.

But if in any year the said Lessee shall not be able to mine coal from the demised premises for a continuous period of not less than thirty (30) days because of a general strike among the miners in the section where its operations are being conducted, then the said Lessee shall be released from the payment of an equitable proportion of the minimum annual rental, provided always that the period or periods of time in any one year to which such equitable release applies shall not exceed in all a total of four months.

Should any question arise between the Lessors and the Lessee as to what is an equitable proportion of minimum annual rental as provided for in the last preceding clause of this article, the Lessors or Lessee may submit such question to arbitration under Article Thirty-five of this indenture.

Whenever in the opinion of the Chief Engineer of the Lessors and Chief Engineer or other proper officer of the Lessee the quantity of coal remaining to be recovered hereunder shall be such that if the same were mined at the royalty rate provided for in Article Two hereof, the total amount of such royalty would only be sufficient to compensate the Lessee for payments made by him of minimum annual rental in excess of tonnage royalties and for which the Lessee has not reimbursed himself by mining free from royalty as herein provided in this Article, then and in such case the Lessee shall not be required to make any further payments of minimum annual rental, but shall have the privilege of mining free from royalty a quantity of coal sufficient at the rates of tonnage royalties provided for in Article Two hereof to
 377 reimburse him for such excess payments, and if there then remains coal to be recovered hereunder, the Lessee shall mine and pay for the same at the rates of tonnage royalties provided for in Article Two hereof, and said rates of tonnage royalties shall in no manner be affected by the rate of royalty per ton above provided for determining when the Lessee may be

relieved from making further payments of minimum annual rental.

Article Four: The Lessee shall keep books of account of the mining, using and shipping of coal mined hereunder, and said books shall be open at all reasonable times for the inspection of the Lessors, their agents or attorneys, or other persons in their behalf, for the purpose of comparing and verifying the reports rendered by the Lessee under Article Two hereof, or for obtaining information as to the mining, using, shipping, and selling of said coal during any period.

Article Five: The lessee shall locate all mine openings, buildings, railway sidings, and other improvements in accordance with plans approved by the Chief Engineer of the Lessors.

Should any question arise as to the reasonableness of any requirement of the Chief Engineer of the Lessors under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Six: The Lessee shall at all times locate all dumps for and dispose of all refuse or waste material of whatever nature, with the approval of the Chief Engineer of the Lessors, and in such manner that such refuse or waste material shall not fall, or be liable to fall, or be carried into any stream of water by the action of the elements or otherwise; and shall comply with any further rules and regulations that may be prescribed by the Chief Engineer of the Lessors in respect to the disposal of such refuse and waste material.

278 Should any question arise as to the reasonableness of any requirement, rule, or regulation that may be prescribed by the Chief Engineer of the Lessors under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Seven: The Lessee shall, in accordance with plans of mining and description thereof, as provided for in Article Twelve hereof, work and mine the coal from the vein or seam of coal included in this lease in the most effectual, workmanlike and proper manner, according to the most approved and suitable methods of modern mining, and in such manner as to ultimately recover the greatest possible amount of coal from said vein or seam, except as provided in Article Eight and Nine hereof; and in such manner that the mining of said vein or seam shall not injure or destroy any other veins or seams underlying said leasehold boundary, or prevent the convenient and proper mining of the coal therefrom, or interfere with the proper exercise of the rights and privileges hereinbefore excepted and reserved to the Lessors; and shall comply in every respect with the laws of the State of West Virginia or of the United States, now existing

or hereafter passed, regulating the management and operation of mines.

Should any question arise between the Lessors and Lessee under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Eight: The Lessee shall not, except as provided in Article Nine hereof, be obligated to mine such portion or portions of said vein or seam of coal where the total thickness of the vein or seam may be less than thirty-six (36) inches in thickness, or that may prove faulty, or that may not, with proper preparation, yield merchantable coal, and which, within three

379 months after written demand on it made for that purpose by the Lessors, the Lessee shall not notify the Lessors in writing of his intention to mine forthwith. Such demand shall be held to apply only to such portion or portions of said vein or seams as the Lessors may desire at that time themselves to mine, or to let and lease to another lessee or other lessees, or that may be threatened with abandonment by the Lessee hereunder. If the Lessee, after any such demand upon it and within the period aforesaid, elects to mine any such portion or portions of said vein or seam, or if after his failure to so elect he thereafter requests and obtains in writing the consent of the Lessors to mine the same, then he shall be obligated to mine such portion or portions of said vein or seam under all the terms hereof.

The Lessee shall leave such pillars and supports of coal as the Chief Engineer of the Lessors may direct for the protection of the entries leading to any such portion or portions of said vein or seam as the Lessee may not elect to mine hereunder and which cannot be advantageously mined without using the mine workings of the Lessee.

Should any question arise between the Lessors and Lessee under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Nine: The Lessee shall, by diamond drilling or some other approved method, test within, beyond, or around such portion or portions of said vein or seam of coal where the total thickness of the vein or seam may be less than thirty-six (36) inches in thickness, or that may prove faulty, or that may not with proper preparation yield merchantable coal, so as to thoroughly establish the extent and limits of such portion or portions of said vein or seam, and shall drive such entries and air

380 courses through the same as may be found necessary, in order to reach coal which, under the terms hereof, the Lessee is obligated to mine.

Should any question arise between the Lessors and Lessee under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Ten: The Lessee shall not at any time, except with the written consent of the Chief Engineer of the Lessors, drive any drift, tunnel, slope, shaft, room, entry, or air course, within sixty (60) feet of any of the outside boundary lines of the leasehold boundary first hereinbefore described (crop boundaries not included), or within sixty (60) feet of any mine workings in the same vein or seam of coal and pertaining to any other interest or estate, leasehold or otherwise.

Article Eleven: The Lessee shall so conduct his operations hereunder as not to violate any rights of lateral or subjacent support belonging to any owner or lessee of the surface (other than the Lessors, or farm tenants of the Lessors) of the lands herein described, or pertaining to any other interest or estate, leasehold or otherwise; and if there shall arise any question or damage to the surface of the lands herein described which may not be owned by the Lessors, or to the operations of any other lessee or lessees (other than farm tenants) to whom the Lessors may let and lease any of the right and privileges hereinbefore excepted and reserved, or pertaining to any other interest or estate, leasehold or otherwise, in such case the Lessee hereunder shall and does assume all responsibility therefor without claim upon the Lessors, except to their assistance and support in the proper defense of all mining rights and privileges covered by their respective titles, the Lessee hereunder bearing all costs and expenses, legal and otherwise, connected therewith.

384 Article Twelve: The Lessee shall work and mine the coal in accordance with general and detailed plans of mining and description thereof, embodying the provisions of Articles Seven to Eleven hereof, both inclusive, which shall be prepared by the Lessee and be submitted to the Chief Engineer of the Lessors, and shall not be put in operation unless and until the same shall have been approved in writing by the Chief Engineer of the Lessors. No change in, or modification of, or departure from any plan so approved, shall be made in the development or operation of the mine unless agreed to and approved in writing by the Chief Engineer of the Lessors, and the Lessee shall make such changes as may be required from time to time in writing by the Chief Engineer of the Lessors, such request or requirement to be accompanied by plans illustrating such change, modification, or departure.

Article Thirteen: If at any time the Lessee shall not conduct his operations as provided in Article Five to Eleven hereof, both

inclusive, or in accordance with plans of mining, or modification thereof, as provided for in Article Twelve hereof, and loss of coal or other damage to the Lessors may thereby result or be threatened, the Chief Engineer of the Lessors shall have authority to determine where and in what particular the provisions of said Articles are being violated, and to enter for the Lessors and stop the work at such place until the Lessee shall comply with the provisions of said Articles in the further prosecution of his operations; and the Lessee shall pay to the Lessors the full amount of royalty on the estimated tonnage of coal lost or that may remain unmined by reason of the failure of the Lessee to conduct his operations as aforesaid, in the same manner as if said coal had been mined and removed, and shall compensate the Lessors for the full amount of any other damage that the Lessors shall sustain thereby, such royalty or other damages to be recovered, in default of prompt payment, under Article Thirty-one hereof; provided, however, that the lessee shall not be required to mine and remove such pillars of coal now standing in the old mine workings of William Ann Coal Company as the Chief Engineer of the Lessors shall, in writing, agree that the Lessee may leave unmined; it being expressly understood and agreed that the decision as to whether or not the Lessee shall be relieved, either temporarily or permanently, from his duty to mine any of said pillars shall be left solely to the judgment and decision of the Chief Engineer of the Lessors; and if Lessee, when required by the Chief Engineer of the Lessors to mine and remove any section or area of said William Ann pillars, shall desire to be relieved from carrying out such requirement, he may be so relieved by paying to the Lessors the sum of seven (7c) cents for each ton of coal contained in such of said pillars as he may elect to be relieved from mining, the quantity of which said coal shall be determined, if access thereto is available, by measurements made by or under the direction of the Chief Engineer of the Lessors, and if access thereto is not available, then by measurements made by the Chief Engineer of the Lessors from maps thereof in possession of the Lessors; payments falling in this category to be made by the Lessee within three months of the time when agreement respecting the mining or leaving of such pillars shall have been reached between the Lessors and the Lessee pursuant to the terms of this proviso clause of this Article Thirteen.

Upon failure of the Lessors and Lessee to agree upon the amount of such royalty or other damages, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Fourteen: The Lessee shall employ an experienced and competent engineer, whose duty it shall be to make surveys, 383 determine elevations, prepare the plans and maps provided for in Articles Five, Seven, and Twelve hereof, give directions and courses for all entries, airways, rooms, and other mine workings, and prepare and keep up, on a scale of one hundred (100) feet to one (1) inch, an accurate map of the vein or seam of coal being mined by the Lessee, which map shall be posted every three (3) months and shall show accurately and completely, on true meridian, the boundaries of all the lands hereinbefore described, the location of all railway tracks, rights-of-way, streams, roads, buildings, and other improvements within the boundaries of said lands, all mine workings within the boundaries of the lands hereinbefore described, together with elevations on tidewater datum either in the mine workings or on the surface, and any additional information that can be practically obtained, and that may be necessary to the safe and proper conduct of the Operations hereunder, or that may reasonably be required by the Chief Engineer of the Lessors. The size of said map shall accord with standards to be furnished by the Chief Engineer of the Lessors, and two copies of said map shall be sent to the Chief Engineer of the Lessors on or before the twentieth (20th) days of January, April, July, and October of each year, properly posted in accordance herewith for the three months ending on the last day of the calendar month immediately preceding; and the Lessors, their agents or engineers, or other persons in their behalf, shall at all times have access to the maps, plans, and tracings of the Lessee, and may take therefrom copies of such portions as may be desired.

Should any question arise between the Lessors and the Lessee as to the reasonableness of any additional information which may be required by the Chief Engineer of the Lessors under this Article, such question may be submitted to arbitration under Article Thirty-five of this indenture.

Article Fifteen: If the Lessee shall fail to furnish the 384 map or maps provided for in Article Fourteen hereof, for thirty (30) days after demand therefor shall have been made by the Chief Engineer of the Lessors, the Lessors may at their option employ a competent engineer to make surveys and prepare such map or maps, and the Lessee shall pay to the Lessors the full amount of the expense so incurred, such amount to be recovered, on default of prompt payment, in the manner provided in Article Thirty-one of this indenture.

Article Sixteen: The Lessee shall not cut any boundary, corner, or line trees, nor any black walnut or poplar trees of any size or dimension whatsoever, nor such trees of other species as may

be selected and designated by the Chief Engineer of the Lessors to be left as seedlings.

Article Seventeen: If the Lessee shall cut any timber excepted and reserved hereunder, except as referred to in Article Sixteen hereof, then the Lessee shall pay to the Lessors three times the stumpage value of said timber at the time cut, such amount to be recovered, on default of prompt payment, in the manner provided in Article Thirty-one of this indenture.

Article Eighteen: The Lessee shall not sell or knowingly permit the sale or introduction of any intoxicating liquors upon the lands herein described or any lands adjacent thereto which may be owned by or be under the control of the Lessee, or in which the Lessee may have leasehold rights.

Article Nineteen: The Lessee shall not purchase, lease, or otherwise acquire any lands or interests in lands within the boundaries of or adjacent to the lands herein described, without the consent of the lessors in writing for that purpose being first had and obtained.

And the Lessee will not use or permit to be used any of the lands hereinbefore described except for the purposes of
385 this lease and in accordance with the terms and provisions thereof.

Article Twenty: The Lessee shall not transport into, over, through, or under the lands herein described, or ship from said lands, any coal mined by the Lessee from other lands, or any coke or other product of coal manufactured from coal mined by the Lessee from other lands, without the consent of the Lessors in writing for that purpose being first had and obtained.

PART II. THE MINING PLANT AND EQUIPMENT LEASE

And in consideration of the sum of One Dollar (\$1.00), the receipt whereof is hereby acknowledged, and of the performance and observance of the terms, conditions, covenants, stipulations, and agreements in the foregoing Part I and hereinafter in this indenture set forth to be performed and observed by the Lessee, and reserving as rent the rentals and other payments in said Part I and hereinafter in this indenture provided for, the Lessors do hereby let and lease unto the Lessee, for the term or period of thirty (30) years from the 1st day of May 1934, or to the 1st day of May 1964, but subject to all the terms, provisions, and agreements hereinafter mentioned, and as appurtenant to and not in any manner independent of the mining and shipping of coal by the Lessee from the leasehold boundary described and upon the terms stated in Part I of this indenture, all the following described realty and personalty, situate, lying, and being

in, upon, and under the leasehold boundary first hereinbefore in Part I hereof described, to wit:

Houses, Tipple, Structures, and their Fittings: 53 Frame miners houses. 1 Tile blacksmith shop and mine foreman's office combined. 1 Stone and steel electric shop building, housing—1 Drill Press, equipped with 1 H. P. Motor, Serial No. 04100; 1 Lathe, equipped with 1 H. P. G. E. Motor, Serial No. 3919676; 1 Hack Saw, equipped with 1 H. P. Westinghouse Motor, Serial No. 3879152; 1 Set of Yale & Towle chain blocks; 1 Stone and steel substation building, housing—2 150-KVA G. E. Rotary converters; 6 50-KVA Transformers; 1 Switchboard complete; 1 General Electric demand limiting device with motor. 1 Stone and steel supply house. 1 Frame oil house. 1 Frame sand house, equipped with one sand drier. 1 Stone fan house building, together with—1 Jeffrey 6 foot fan and 1 10-H. P. Allis Chambers Motor, Serial No. 52161102-39. 1 Frame garage building. 1 Frame car repair shed. 3 10-KVA Transformers, located back of Electric Shop (for Electric Shop, Blacksmith Shop and Fan). 6 25-KVA Transformers, located near tipple. 2 10-KVA Transformers, located at new Drift West of tipple. 2 10-KVA Transformers, on poles for camp lights; 1 located in Upper Camp and 1 located in Lower Camp. 1 Stevenson-Adamsen Steel Tipple complete with—1 Rubber-belt conveyor, equipped with 1 G. E. 20 H. P. Motor, Serial No. 3945130. 1 30-H. P. General Electric Motor for shaker screens, Serial No. 3951720. 1 Lump boom and hoist, equipped with 7½ H. P. Motor, Serial No. 4697. 1 Nut and slack boom and hoist, equipped with 7½ H. P. Motor, Serial No. 4698. 1 Mine fan complete, with one 15 H. P. Allis-Chalmers Motor, Serial No. BY416D-1026-8152-3.

Mine Cars, etc.: 97 70-Cu. Ft. capacity mine cars, composition steel body with wood bottom. 1 Lot of mine car to be repaired; also one lot of mine car frames, axles, etc. 1 Air Compressor complete, equipped with one 20 H. P. G. E. Motor, Serial E No. 1521662. 2 Electric forges complete with—1 2-complete. 1 Emery wheel complete with one 5 H. P. G. E. Motor, Serial E No. 1521662. 2 Electric forges complete with—1 2-H. P. G. E. Motor, Serial No. 5028031; 1 ½-H. P. Westinghouse Motor, Serial No. 5402250; 2 Complete sets of blacksmith tools. Emery wheel complete with—1 H. P. Motor, Serial No. 41201. 2 Electric Little Giant coal drills, together with 6 augers for same.

Pumps: 1 Demming Pump with 15 H. P. Westinghouse Motor, Serial No. 4688967. 1 Demming Pump with 15 H. P. Westinghouse Motor, Serial No. 4819960. 1 Demming Pump with 20 H. P. Westinghouse Motor, Serial No. 4832647. 3 Demming Pumps complete with 5 H. P. Allis-Chalmers Motors.

Electric Cutting Machines: 1 35-B Jeffrey Short Wall bottom cutting machine, Serial No. 11465. 1 35-B Jeffrey Short Wall bottom cutting machine, Serial No. 13179. 1 35-B Jeffrey Short Wall bottom cutting machine, Serial No. 14087. 1 35-B Jeffrey Short Wall bottom cutting machine, Serial No. 13405.

288 **Electric Motors:** 1 4-Ton Jeffrey gathering motor, Serial No. 6245. 1 4-Ton Jeffrey gathering motor, Serial No. 6246. 1 4-Ton Jeffrey gathering motor, Serial No. 6247. 1 4-Ton Jeffrey gathering motor, Serial No. 6286. 1 6-Ton Jeffrey tram motor, Serial No. 6423. 1 10-Ton Jeffrey tram motor, Serial No. 7095.

Miscellaneous Equipment and attached Materials: 40,000 feet or more of 4 0 figure eight copper trolley wire all hung with hangers and clamps, complete. 20,000 feet or more of 40 lb. steel laid on ties, all bonded, together with the ties to which attached. 40,000 feet or more of 20 lb. steel laid on ties, all bonded, together with the ties to which attached. 1 Set of Fairbanks-Morse mine scales, with quick moving dial. 9,000 (approximately) feet of 2, 3, 4, & 6 inch pipe, laid. 6 Standard Gauge Railroad side-tracks at tipple, containing 4,000 feet of 85 lb. steel rail.

Miscellaneous Supplies and Chattels: 1 Lot of mine supplies, consisting of repair parts for Jeffrey mine machines and motors; miscellaneous bolts, washers; cotter keys, lumber, powder, dynamite, fuses, mine props, timber, oils, grease, etc. 1 Road wagon. 1 Dump wagon. 2 Mules with two complete sets of harness. 1 Lot miscellaneous company tools, consisting of picks, shovels, bars, etc. 1 Lot scrap iron and steel.

389 It is understood and agreed that the foregoing realty and personalty may be employed and used by the Lessee solely for the purpose of mining, removing, loading, and shipping of the coal underlying the leasehold boundary in Part I of this indenture first described; and if at the expiration of said period of thirty (30) years the Lessee has not mined and removed all of said coal, then this lease shall be extended and renewed for a period of thirty (30) years upon the same terms, covenants, stipulations, and agreements herein contained, and subject to the payment of the same rentals and other payments herein reserved and provided for, and shall be further renewed for a like period from time to time, and in the same manner, until all of said coal has been mined and removed.

This Part II of this indenture of lease is subject to the following terms, conditions, covenants, stipulations, and agreements which the Lessee covenants to and with the Lessors faithfully to perform and observe, viz:

Article Twenty-one: The Lessee covenants that he will from time to time enlarge, increase, improve, and add to the mining

plant and equipment herein and hereby leased and let to him by the Lessors, in order to increase the production and to improve the preparation of the coal mined, produced and marketed therewith and in particular that he will, on or before the first day of January 1925, have expended in repairs upon the above described mining machinery and equipment, and in the purchase of additional mining machinery and equipment, not less than the sum of Twenty Thousand (\$20,000.00) Dollars, reckoned at invoice cost.

Article Twenty-two: All additional structures and equipment, and all machinery, mining supplies, goods, and chattels
390 of every kind and character which the Lessee may hereafter bring upon or use in connection with the leasehold boundary hereinbefore in Part I of this indenture first described, shall at all times be and remain the property of the Lessors, subject to the Lessee's right to use the same upon said leasehold boundary pursuant to the terms generally of this indenture of lease; and the Lessee shall not remove, nor permit to be removed, any of such property from the said premises except for the purpose of having repairs made thereon or, when the same has become worn out or obsolete, for the purpose of disposing of the same in replacing it with new or other property similarly adapted for use upon said premises. Commissary merchandise brought upon said premises shall not be subject to the provisions of this article so long as the same is being offered for resale by Lessee in the due and normal course of his operation hereunder, but not otherwise.

Article Twenty-three: The Lessee shall, on or before the 20th day of each January during the continuance of this lease, furnish Lessors an inventory showing the buildings, structures, plant and other equipment, machinery, accessories, goods, and chattels situate upon said premises as at the first day of said January, or brought upon said premises since the preceding January first, in as much detail as is hereinbefore employed and or as may be required to be employed in listing such property for state and county taxes, including, inter alia, steel rail, steel ties, switches, electric trolley wires, electric cables, etc., etc., whether in service or otherwise. Lessors shall have the right to verify any such inventory, and likewise shall, at all business hours, have access to and the right to inspect the invoices, books, and records of Lessee showing the character and amount of such property
brought on Lessors' premises at any time.

391 Article Twenty-four: Lessee shall throughout the term of this lease, by repairs and replacements, maintain the aforesaid houses, buildings, tipples, and other structures, and all mining machinery and equipment of every kind and character,

in good working order and conditions, and shall do the like with respect to any other structures, machinery, equipment, and facilities that Lessee may from time to time add thereto.

Article Twenty-five: Lessee covenants that he will, at any and all times throughout the term of this indenture of lease, or of any removal or extension thereof, and at his own cost and expense, have and keep insured, in solvent and reputable companies, continuously against loss or damage by fire and/or lightning, all said buildings, structures, tipples, and other property, both fixed and movable, and liable to loss from such causes, in an amount not less than eighty (80%) percent of the insurable value thereof, with not exceeding twenty (20%) percent co-insurance, and with loss clause thereon payable to Lessors and Lessee jointly, as their interests may appear; provided, however, that any claim for loss or damage under said policies for any sum less than Two Hundred (\$200.00) Dollars may be paid directly by the insurers to Lessee. The proceeds of such policies paid to Lessors and Lessee jointly shall be used for the repair and or restoration of the loss or damage for which such proceeds are paid, or shall be expended by Lessee on other improvements upon the leased premises; and provided further that if Lessee shall be in default in payment to Lessors of any of his obligations hereunder, or under the terms of the aforesaid Coal Mining Lease, Lessors may, at their election, require that such proceeds, whether more or less than the sum of Two Hundred Dollars (\$200.00), shall be paid to Lessors in or towards curing such default, but without impairment of the obligation of
 392 Lessee to repair or to restore the loss or damage at his own expense.

Lessee further covenants that he will, at least once each year, and at more frequent intervals whenever so requested by Lessors, their agents, or attorneys, furnish Lessors a detailed statement showing the kind and amounts of insurance carried, and the property insured, and that he will, whenever requested by Lessors, deliver possession of the policies of insurance to Lessors, and that Lessors may, if they so desire, retain possession thereof.

Article Twenty-six: Lessee shall pay to Lessors for the use of the property first hereinbefore in this Part II described, and as improved and augmented by Lessee pursuant to the provisions of Article Twenty-one hereof, a rental, hereby reserved, of two cents (2c) per net ton upon each and every ton of coal produced by him from the leasehold boundary in Part I of this indenture first described, which said tonnage of coal shall be ascertained and reported at the same time and in the same manner as provided in Article Two of this indenture.

Article Twenty-seven: The Lessee shall pay to the Lessors, as a minimum annual rental for the mining plant and equipment first hereinbefore in this Part II of this indenture described, without regard to the quantity of coal mined and produced by him by the use of said mining plant and equipment, for the remainder of the calendar year 1934 the sum of Fifteen Hundred (\$1,500.00) Dollars and for each calendar year thereafter during the continuance of this lease the sum of Three Thousand (\$3,000.00) Dollars, payment whereof shall be made upon the same quarterly dates and credits, reductions, or abatements therein permitted at the same proportionate rate as are by the terms of Article Three of this indenture provided in the case of the minimum annual rental on the coal leasehold hereinbefore in Part I hereof first described.

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PART III

This Indenture of Lease in its entirety is subject to the further following terms, conditions, covenants, stipulations, and agreements which the Lessee covenants to and with the Lessors faithfully to perform and observe, viz:

Article Twenty-eight: The Lessee shall pay all taxes and assessments that may be levied or assessed on and after January 1st, 1934, against the leasehold boundary in Part I of this indenture first described, for the coal mined therefrom, or the products manufactured from said coal, and against all the property of every kind and character, both realty and personalty, that is described and demised in Part II of this indenture, in whatever name assessed; and if any such taxes and assessments are paid by the Lessors, the Lessee shall repay to the Lessors the amount thereof, such amount to be recovered, in default of prompt payment, under Article Thirty-one hereof; provided, however, that in case any of the rights and privileges hereinbefore excepted and reserved shall be let and leased to another lessee or lessees, except to tenants for the purpose of occupying and farming the surface, then the amount of the taxes to be paid by the Lessee hereunder shall be in proportion to the extent of the rights and privileges of the Lessee hereunder as compared with the rights and privileges of such other lessee or lessees.

Should any question arise as to the proper apportionment of such taxes, such question may be submitted to arbitration under Article Thirty-five hereof.

Article Twenty-nine: The Lessee shall not mortgage nor assign, convey, lease, underlet, sublet, or set over any of his estate, interest, or rights hereunder, or any part thereof, to any person or persons whomsoever or any corporation whatsoever, for any time whatsoever, without the license and consent of

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the Lessors in writing for that purpose being first had and obtained upon penalty of forfeiture of all his rights hereunder without the necessity of prior written notice; and in case of any such assignment or transfer, the transferee shall assume in writing all the obligations imposed hereunder upon the Lessee in a form satisfactory to the Lessors; but this covenant shall not prevent the Lessee from leasing any house or building or part thereof to his agents or employees for purposes connected with Lessee's operations under this lease; and neither this lease nor the term created thereby, nor any rights and privileges hereby conferred, shall be subject to sale or disposition or possession thereof, in whole or in part, by or under the judgment, decree, or order of any court, or by or through any judicial process at law or in equity, except for the purpose of enforcing, at the instance of the Lessors, the Lessors' rights and remedies hereunder, including the lien provided in this lease to secure the payment of all rents and royalties and other sums of money.

Article Thirty: The Lessors, their agents, engineers, or other persons in their behalf, shall at all reasonable times have the right and privilege of entering the houses, buildings, and other structures, and the works and mines of the Lessee, in, upon, or beneath the surface of the lands herein described, in order to inspect, examine, survey, or measure the same, or any part thereof, or for any lawful purpose, and for these purposes to use freely the means or access to the said structures, works, and mines, without hindrance or molestation.

Article Thirty-one: All royalties, rentals, and other payments hereunder agreed to be paid to the Lessors, shall be due
 395 and payable, without demand therefor, 60% thereof to United Thacker Coal Company, P. O. Box 301, Huntington, W. Va., and 40% to the Trustees, Transportation Bldg., Cincinnati, Ohio, or/as the Lessors may hereafter in writing designate, on the 25th day of the calendar month next succeeding that for which the same have accrued, except that the minimum coal royalties and the minimum plant and equipment rentals provided for in Article Three and Article Twenty-seven, respectively, of this indenture, shall be paid on the 25th days of January, April, July, and October of each year for the royalties and rentals, respectively, that have accrued for the three calendar months immediately preceding; and all such royalties and rentals shall be deemed and treated as rents reserved upon contract by the Lessors; and all remedies now or hereafter given by the laws of the State of West Virginia to landlords for the collection of rents shall exist in favor of the Lessors for the collection of the same; and if any of said royalties, rentals, or other payments shall remain unpaid for fifteen (15) days after the same become due and

payable as hereinbefore provided, the Lessors shall have the right to enforce the payment of the same by the remedies given by law to landlords against delinquent tenants for nonpayment of rent; and a lien is hereby expressly reserved, created, given, and imposed upon the leasehold estate hereby created, together with all the shafts, houses, buildings, tipples, structures, ovens, and improvements of every character thereon and fixtures belonging thereto, including all rails and tracks inside and outside the mines, upon all machinery, equipment, mine supplies, and accessories, whether fixed or movable, appurtenant to said leasehold and the mining plant thereon, upon every manner of chattels, and upon the stock or stocks of merchandise, if any, brought and maintained thereon by the Lessee, insofar as the law permits a lien on stocks of merchandise, and upon all the rights and privileges hereby conferred upon the Lessee, to secure the payment of all said royalties, rentals, and other payments, and also to secure the payment of all taxes and assessments required to be

396 paid by the Lessee under the terms of this lease.

The Lessors shall also have the right of reentry by reason of any royalty, rental, or other payment being in arrear, or by reason of any breach of any of the terms, conditions, covenants, stipulations, or agreements herein contained, in the same manner and with the same effect as is provided in Article Thirty-four hereof, or is now or hereafter may be provided under the laws of the State of West Virginia.

All the provisions herein contained for the collection of royalties, rentals, or other payments, shall be deemed cumulative and not exclusive, and shall not deprive the Lessors of any of their other legal or equitable remedies.

And it is mutually covenanted by and between the Lessors and the Lessee that—

Article Thirty-two: Nothing herein contained shall be or be deemed to be on the part of the Lessors a covenant for title, express or implied.

Article Thirty-three: The Lessors shall not sell, or knowingly permit the sale or introduction of, any intoxicating liquors upon the lands herein described, or any lands adjacent thereto which may be owned by or be under the control of the Lessors, or in which the Lessors may have leasehold rights.

Article Thirty-four: All of the preceding terms, conditions, covenants, stipulations, and agreements to be performed and observed by the Lessee, and the covenant of the Lessee to perform and observe the same, shall inure to the benefit of the Lessors, as their respective interests appear and are, and the Lessors may, by proper action at law or suit in equity, reentry, distress, or other

proper proceeding, enforce any and all of said terms, conditions, covenants, stipulations, and agreements and the covenant
 397 of the Lessee to perform and observe the same. In case the Lessee shall refuse or fail at any time to submit to arbitration in the manner hereinafter provided in Article Thirty-five hereof, when demanded or requested by the Lessors, any question which said last named Article provides shall be determined by arbitration, or any other question which the terms of this lease provide shall be or may be submitted to arbitration, or shall in any way attempt to prevent a decision of any such question by arbitration, either by revoking or attempting to revoke the authority of the arbitrators or any of them to act, or otherwise; or in case the Lessee shall fail to pay any of the rents, royalties, taxes, or other payments, when and as the same shall become due and payable, and such failure shall continue for a period of thirty (30) days; or in case the Lessee shall fail in the performance or observance of any of the other of said terms, conditions, covenants, stipulations, and agreements, and any such failure as to any of such other terms, conditions, covenants, stipulations, and agreements shall continue for the period of sixty (60) days after the Lessors shall have given written notice of such default to the Lessee, or shall use the lands herein described contrary to the provisions or limitations hereof and such use shall continue for a period of sixty (60) days after the Lessors shall have given written notice thereof to the Lessee; then in either or any of said events, and as often as the same may occur, the Lessors shall have the right to forfeit and terminate this lease and the term created thereby and all of the rights and privileges of the Lessee under this lease, and reenter upon the demised premises by their agent or agents and the same again have, repossess, and reenjoy as fully as if this lease had never been executed, but it shall not be necessary for the Lessors to make any such reentry or to make demand upon the Lessee in order to effect or enforce any such forfeiture, or to effect such reentry or in order to bring any action or suit to recover the demised premises; and a waiver by the Lessor of any
 398 particular cause of forfeiture shall not prevent the forfeiture and cancellation of this lease for any other cause of forfeiture or for the same cause occurring at any other time. The remedies given in this article are merely cumulative and shall not deprive the Lessors of any of their other legal or equitable remedies.

Article Thirty-five: Should any question arise between the Lessors and the Lessee, regarding the amount of damage accruing to the Lessee on account of the exercise by the Lessors of any of

the rights and privileges hereinbefore excepted and reserved, or which under Articles Two, Three, Five, Six, Seven, Eight, Nine, Thirteen, Fourteen, Twenty-one, and Thirty-eight hereof, is subject to arbitration, every such question shall be determined by arbitration in the manner provided for in this Article; and the parties hereto do hereby covenant each with the other to comply with and carry out promptly the decision or award of any and every board of arbitration appointed under this Article.

Questions of dispute to be determined by arbitration hereunder shall be referred and submitted to the decision of three arbitrators. The party desiring such arbitration shall give written notice of the same to the other party, stating therein definitely the point or points in dispute, and name the person selected by such party as arbitrator; and it shall be the duty of the other party hereto, within ten (10) days after receiving such notice, to name an arbitrator and give written notice thereof, to the party desiring such arbitration, and in the event it does not do so, the party serving such notice may select a second arbitrator, and the two thus named shall select the third arbitrator. If the arbitrators first named cannot or fail to agree within ten days after their selection, upon the third arbitrator, then any one of the judges for the time being of any court of the United States having jurisdiction over Mingo County, West Virginia, shall, upon the application of either the Lessors or the Lessee, and after notice 399 to both of them, appoint the third arbitrator. The arbitrators thus chosen shall give to each of the parties hereto written notice of the time and place of hearing which hearing shall be not less than five (5) nor more than ten (10) days thereafter, and at the time and place appointed shall proceed with the hearing, unless for some good cause, of which the arbitrators or the majority of them shall be the judges, it shall be postponed until some later day or date within a reasonable time. Both of the parties hereto shall have full opportunity to be heard on any question thus submitted, and the determination of the Board of Arbitration thus constituted, or the majority of the persons composing the same, shall be made in writing and a copy thereof delivered to each of the parties hereto, and shall be final and conclusive upon the parties in reference to the question or questions thus submitted. And the said arbitrators, or any two of them, may, in their decision or award, as a part thereof, decide by whom the costs of such arbitration shall be borne and paid in whole or in part, and the amount of such costs. All the arbitrators shall be impartial and disinterested men, and before acting shall be sworn to honestly and impartially discharge their duties.

Article Thirty-six: The giving of any notice to, or the making

of any demand on, the Lessee under the provisions hereof, if any, shall, in addition to any other legal way of serving the same, be sufficient if in writing addressed to the Lessee and delivered to any of his agents and superintendents or to his attorney of record. And the giving of any such notice, or the making of any such demand, shall also be sufficient if in writing addressed to the Lessee and left upon the demised premises with any superintendent, manager, or clerk there in charge of Lessee's mines or office, and if there should be no one in charge of the mines or of the office, then a notice or demand in writing posted on the door of the office or at the entrance to any mine, shall have the same force and effect as if the notice had been served or
 400 demand made personally upon the Lessee, in the manner provided by law for the service of summonses in personal actions. Ten (10) days shall be considered a reasonable notice or demand.

Article Thirty-seven: All the terms, conditions, covenants, stipulations, and agreements to be performed and observed by the respective parties hereto shall be binding upon their heirs, successors, and assigns, and shall inure to the benefit of the other of the said parties and their or his heirs, successors, or assigns, and said other party, their or his heirs, successors, or assigns, may enforce any or all of said terms, conditions, covenants, stipulations, and agreements.

Article Thirty-eight: In case the Lessee shall at any time be dispossessed by paramount title of any part of the premises hereby demised, this lease shall not thereby be terminated, but the annual minimum rental as aforesaid to be paid by the Lessee shall thenceforth be diminished in the proportion that the amount of fee or mineral land of which the Lessors are so dispossessed bears to the total amount of fee and mineral land hereby demised; provided always that if the part or parts of the demised premises of which the Lessee has been so dispossessed are so essential to this lease that the lease ought not longer to continue as to any part of the demised premises, the Lessee shall have the right, upon the payment of all rents and royalties accrued or due, to have this lease cancelled as hereinafter provided, and not otherwise, that is to say: If upon the Lessee claiming at any time the right of such cancellation the Lessors shall not agree thereto, the question of the right of such cancellation shall be submitted to arbitration under the provisions of Article Thirty-five of this indenture.

401 Article Thirty-nine: At any termination of this indenture of lease by forfeiture as provided in Article Thirty-four, all houses, buildings, tipples, substations, and other struc-

tures, all ovens and other improvements of every character thereon attached to or forming part of the lands, and the machinery and appliances belonging thereto, including all rails, ties, trolley wires, cables, pipe lines, and telephone lines, both inside and outside the mines, together with all locomotives, cutting machines, mine supplies, and accessories forming any part of or connected, directly or indirectly, with Lessee's late mining operations on said leasehold, whether fixtures or movables, shall revert to and become the property of the Lessors, respectively, as their respective interests in the land upon which situate at the time appear and are. And at any termination of this lease other than by forfeiture, all houses, buildings, tipplers, substations, and other structures, all ovens and other improvements of every character thereon attached to or forming part of the lands, and the machinery and appliances attached or appurtenant thereto which cannot be dismantled and removed without injury to the structures to which attached, shall revert to and remain the property of the Lessors as their respective interests in the land on which situate appear and are, but all locomotives, cutting machines, mine cars, trolley wires, cables, mine supplies, tools, and other goods and chattels which are not so attached to the land or to some such structure (and which for convenience are collectively designated as "movables"), shall, if requested by the Lessors, be valued by two disinterested persons, one to be chosen by each of the parties hereto, who, in case of disagreement, shall choose a third; and the third thus chosen, or a majority of the three of them, shall appraise said movables; and the Lessors, as their respective interests appear and are, shall, in case of such appraisal, have the option, within thirty days notice of such appraisal, to purchase said movables at such appraised valuation. If

402 the Lessors shall not request such appraisal the Lessee shall have the privilege of removing such movables from the land herein described at any time within six months from such expiration of the lease. Upon Lessee's failure to remove said movables within said six months' period, they shall become and remain the property of the Lessors. Provided, always, that the valuations placed upon such movables by said appraisers shall not exceed the price which such movables would bring if sold as second-hand equipment for uses to which it is reasonably adapted in another going coal mining operation, the cost of its removal, and its transporting to and reconditioning for use in some other mining plant, considered.

Article Forty: Simultaneously with the delivery to the Lessee of this indenture of lease, the Lessors, by letter addressed to Lessee, bearing date of May 1st, 1934, have granted to Lessee an

option to purchase the mining plant and equipment described in and contemplated by Part II of this indenture, upon the terms and conditions in said letter set out and contained. It is contemplated by the parties hereto that Lessee will in due season exercise such option to purchase, whereupon he will become the owner of such mining plant and equipment, subject to the terms and conditions set out in said letter, and that thenceforth said Part II will be no longer operative between the Lessors and the Lessee. And it is understood and agreed between the parties hereto, that unless and until the Lessee shall have become the purchaser thereof, pursuant to the terms of said option, said mining plant and equipment, whether as now constituted or as enlarged and augmented by Lessee pursuant to the terms and provisions of said Part II of this indenture of lease, shall at all times be and remain the property of the Lessors, as their respective interests in the land on which situate appear and are, notwithstanding any and all implications carried in Articles 403 Thirty-one and Thirty-nine of this indenture to the contrary.

Article Forty-one: In and by that certain Indenture of Lease (hereinafter referred to as the "Lease to the Receivers"), bearing even date herewith, executed and delivered prior to this Indenture of Lease, the said parties of the first part hereto have let and leased to Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company (hereinafter called "Receivers") the sole and exclusive right and privilege of extracting, mining, and removing coal for the said Receivers' use from the Upper Thacker vein or seam of coal in, upon, or under the leasehold boundary first hereinbefore in Part I of this Indenture of Lease described, for the period of fourteen (14) months from the first day of May 1934 to the first day of July 1935, renewable at the option of the Receivers from year to year, not exceeding an aggregate period of four (4) years from and after June 30, 1935; said letting and leasing to the Receivers being upon and subject to all the terms, conditions, covenants, stipulations, and agreements, and to the payment by the Receivers as rent of the royalties, rents, and other payments as contained, provided for, and set forth in the Lease to the Receivers, which is duly filed for record, or recorded, in the office of the Clerk of said Mingo County Court prior to the filing for record, or recordation, of this indenture, and to which reference is here made. Under and by virtue of the provisions of the Lease to the Receivers, the Receivers have the right and privilege of contracting with said Daniel H. Pritchard (party hereto of the second part), as an independent contractor, for the service and

work of extracting, mining, removing, transporting, and loading on railroad cars, the coal which the Receivers in and by the Lease to the Receivers have the sole and exclusive right of extracting, mining, and removing for the Receivers' use. The said Daniel

H. Pritchard has contracted with the Receivers, as an independent contractor, for the service and work of extracting, mining, removing, manufacturing, transporting, and loading said coal for shipment to or for account of the Receivers. The said contract between said Daniel H. Pritchard and the Receivers, the Lease to the Receivers, and this Indenture of Lease contemplate that said Daniel H. Pritchard shall have the right to employ and use, and will employ and use, in the performance of his said contract with the Receivers during the term or period of the Lease to the Receivers, and of any extensions or renewals thereof in the Lease to the Receivers provided for, all of the realty and personalty in and by Part II of this Indenture of Lease mentioned and described and therein let and leased to the Lessee hereunder.

Now, therefore, and as a further consideration inducing the parties hereto to make and enter into this Indenture of Lease, it is mutually understood, covenanted, and agreed by and between the Lessors and the Lessee hereunder as follows:

(a) That all the right and privilege of mining and removing coal from the Upper Thacker vein or seam of coal in, upon, or under the leasehold boundary first hereinbefore in Part I of this Lease described, and all the right and privilege of making said coal into coke and other products of coal and of preparing for market, using, transporting, shipping, and selling said coal and coke and other products of coal, granted the Lessee hereunder in and by Part I of this Indenture of Lease, shall be, and are, in all respects, subject and subordinate to the exclusive right and privilege of mining and removing said coal from said vein or seam of coal in, upon, or under said leasehold boundary and to the right and privilege of making said coal into coke and other products of coal and of preparing for market, using, transporting, shipping, and selling said coal and coke and other products of coal, let and leased to the Receivers under and by virtue of the Lease to the Receivers, for and during the term or period of the Lease to the Receivers and/or of any extensions or renewals thereof therein provided for.

(b) That all the privilege in and by said Part I of this Indenture of Lease let and leased to the Lessee hereunder of occupying and using so much of the surface of those certain lands, and of using so much of the stone, sand, water, and timber therein and thereon, and of making therein and thereon such excavations

and improvements of whatever nature, as may be necessary in the proper exercise and enjoyment of the rights and privileges in and by Part I of this Indenture of Lease let and leased to the Lessee hereunder, shall be, and are, in all respects subject and subordinate to the like privilege in and by the Lease to the Receivers let and leased to the Receivers, for and during the term or period of the Lease to the Receivers and/or of any extensions or renewals thereof therein provided for; said certain lands being all those certain tracts or parcels of land mentioned, bounded, and described in Part I of this Indenture of Lease and in, on, under, or in respect of which said privileges are in and by said Part I let and leased to the Lessee hereunder.

(c) That the Lessee hereunder shall have the right to employ and use in the performance of the service and work, as an independent contractor for the Receivers, of extracting, mining, removing, manufacturing, transporting, and loading said coal at the mine tippie on railroad cars for shipment to or upon the order of the Receivers, all of the realty and personalty mentioned and described, let and leased to the Lessee hereunder in and by Part I. of this Indenture of Lease, for and during the term or period of the Lease to the Receivers and/or of any extensions or renewals thereof therein provided for, and in extracting, mining, removing, manufacturing, transporting, and loading

such coal for the Receivers, the Lessee hereunder covenants
406 that he will observe and perform all and several the undertakings and obligations imposed by Article One and Articles Five to Nineteen, both inclusive, of this indenture as fully and completely as though he were extracting, mining, removing, manufacturing, transporting, and loading said coal for his own use and in his own right.

(d) That upon the expiration or sooner termination of the Lease to the Receivers, and of any extension or renewal thereof therein provided for, this Indenture of Lease and every part or provision thereof shall thereupon cease to be subject and subordinate to the Lease to the Receivers, and to any "Part" or provision thereof, and thenceforth be and remain in full force and effect between the parties hereto.

In witness whereof the said United Thacker Coal Company, one of the parties of the first part, has hereunto caused its corporate name to be signed and its corporate seal to be affixed by its Vice President, hereunto duly authorized, attested by its Treasurer; the said H. Langdon Laws, Albert H. Cole, and Charles W. Campbell, Trustees, as aforesaid, the further parties of the first part, have hereunto affixed their signatures and seals;

and the said Daniel H. Pritchard, the party of the second part, has hereunto affixed his signature and seal; all as of the day and year first above written, the same being executed in triplicate.

UNITED THACKER COAL COMPANY.

By (s) BUFORD C. TYNES, *Vice President.*

(s) H. LANGDON LAWS, *Trustee.* [SEAL]

(s) ALBERT H. COLE, *Trustee.* [SEAL]

(s) CHARLES W. CAMPBELL, *Trustee.* [SEAL]

(s) DANIEL H. PRITCHARD. [SEAL]

Attest:

_____, *Treasurer.*

407 STATE OF WEST VIRGINIA.

County of Cabell, to wit:

I, Houston Laird, a Notary Public of said County of Cabell, do certify that Buford C. Tynes personally appeared before me in my said county, and, being by me duly sworn, did depose and say that he is the Vice President of the United Thacker Coal Company, the corporation described in the writing hereto annexed, bearing date the 1st day of May 1934, authorized by said Corporation to execute and acknowledge deeds and other writings of said Corporation, and that the seal affixed to said writing is the corporate seal of said Corporation, and that said writing was signed and sealed by him in behalf of said Corporation, by its authority duly given. And the said Buford C. Tynes acknowledged the said writing to be the act and deed of said Corporation.

Given under my hand and official seal this 13th day of July 1934. My commission expires June 5, 1943.

(s) HOUSTON LAIRD,

Notary Public.

STATE OF OHIO.

County of Hamilton, to wit:

I, Charles H. Stephens, Jr., a Notary Public of said County of Hamilton, do hereby certify that Charles W. Campbell, Trustee; H. Langdon Laws, Trustee; and Albert H. Cole, Trustee, whose names are signed to the writing above and hereto attached, bearing date the 1st day of May 1934, have, each of them, this day acknowledged the same before me in my said county.

Given under my hand and official seal this 14th day of July 1934.

My commission expires on the 27th day of July 1935.

(s) CHARLES H. STEPHENS, JR.

Notary Public.

STATE OF WEST VIRGINIA,

County of Cabell, to wit:

I, Houston Laird, a Notary Public of said County of Cabell, do hereby certify that Daniel H. Pritchard, whose name is signed to the writing above and hereto attached, bearing date the 1st day of May 1934, has this day acknowledged the same before me in my said county.

Given under my hand and official seal this 27th day of July 1934.

My commission expires on the 5th day of June 1943.

(s) HOUSTON LAIRD,

Notary Public.

Agreement recorded in B. C. & L. Book 27, page 412, Mingo County, West Virginia, October 10, 1935.

408 I hereby certify that the foregoing is a true and correct copy of an agreement dated May 1, 1934, between United Thacker Coal Company, H. Langdon Laws, Alfred H. Cole, and Charles W. Campbell, Trustees, and Daniel H. Pritchard, the said copy having been made from an executed counterpart of said agreement.

FRANK R. BRITAIN,

Custodian of Contracts for

Receivers of Seaboard Air Line Railway Co.

409

Application No. 168

In the District Court of the United States for the Eastern
District of Virginia

Consolidated Cause. In Equity, No. 214

GUARANTY TRUST COMPANY OF NEW YORK AND MERREL P. CALLAWAY, AS TRUSTEES, ET AL.; COMPLAINANTS

against

SEABOARD AIR LINE RAILWAY COMPANY, ET AL., DEFENDANTS

And in the Constituent Causes Numbered 213, 214, 228, and 229
of Said Consolidated Cause

APPLICATION OF RECEIVERS IN RESPECT OF ADDITIONS AND BETTERMENTS
AND MISCELLANEOUS MATTERS

To the Honorable LUTHER B. WAY, Judge of the District Court
of the United States for the Eastern District of Virginia:

Leigh R. Powell, Jr. and Henry W. Anderson, the Receivers
herein, respectfully show:

I

As set forth in Section I of Application No. 5 of the Receivers, filed herein on January 27, 1931 (Printed Receivership Record, pp. 640, et seq.), in order to safely, efficiently, and economically manage and operate the railroads and properties in their charge, to preserve and maintain the same and to properly serve the public in the transaction of their business as a common carrier, it is necessary for the Receivers to make and provide from time to time repairs, renewals, replacements, improvements, and additions to said railroad and property, necessary for the normal, usual, and customary maintenance and operation thereof during the receivership. Order No. 5, entered on January 27, 1931, upon Application No. 5, which in subsequent orders of this Court has been confirmed and continued in effect in this Consolidated Cause, provides that with respect to a particular work, project, or improvement, etc., of the character mentioned and included in said Section I and in said Order No. 5 thereon, and where the estimated charge to capital account shall exceed \$6,000, the Receivers shall first make written application to the Court and obtain its authority therefor.

Subject to the approval and authorization of the Court, the Receivers have approved, as included in the respective budget items as numbered and listed below which the Receivers have after careful study and investigation worked out, and as part of their additions and betterments program for the year 1935, the following work or projects of the character mentioned and included in Section I of said application and in said order thereon:

410 Budget Item No. 1.—Operating Facilities:

AFE No. LR-5220. (1 Project.) Location: Waldo, Fla. Rearranging watering facilities. Most of the Receivers' passenger trains stop at the Waldo depot as a regular or flag passenger stop and, due to operating reasons as well as the good boiler water supply, all of these trains, including the Orange Blossom Special, take water at Waldo. The water tank at this point is located about one-half mile south of the station and on a curve. The Receivers plan to move this tank northward and install two standpipes, with necessary pipe lines, so that their engines can take water and do the station work at the same stop. This will mean saving of about five minutes on each train and in addition will eliminate starting on a curve where frequent rough handling of trains is unavoidable in making this difficult start.

Estimated gross cost of project.....	\$6,700
Estimated net charge to capital account.....	8,700

Budget Item No. 3.—Relay Rail:

AFE No. LR-5221. (1 Project.) Location: Richmond, Virginia. Relaying 0.9 mile of side tracks with 90-pound relay rail, releasing present light 60-pound rail which is worn out and not suitable for further use at its present location.

Estimated gross cost of project..... \$7,057
 Estimated net charge to capital account..... 2,356

Budget Item No. 7.—Culverts:

AFEs Nos. LR-5222 to LR-5232, inclusive. (11 Projects.) Replacing 70 lines of worn out culverts or pipes and installing two new additional lines of culverts or pipes, to prevent possibility of washouts due to culvert failure or inadequate drainage, with consequent interruptions to traffic.

Location	Number of lines	Estimated gross cost	Estimated net charge to capital account
Virginia Division	10	\$3,508	\$1,477
Georgia Division	18	4,309	2,855
South Carolina Division	42	8,222	3,023
Totals	72	\$16,039	\$7,355

AFE No. LR-20031-CofGa. (1 Project.) Replacing one line of worn out culvert or pipe between Mildrim, Ga., and Lyons, Ga., to prevent possibility of washout due to culvert failure, with consequent interruption to traffic.

Estimated gross cost of project..... \$91
 Estimated net charge to capital account..... 44

Budget Item No. 8.—Ballast Deck Trestle Program:

AFEs Nos. LR-5233 to LR-5241, inclusive. (9 Projects.) Driving and capping and ballast decking small wooden trestles, bracing and strengthening small wooden trestles, raising and extending small wooden trestles to prevent damage from high water, and placing rip rap stone for protection of abutments, as follows:

Location	Estimated gross cost	Estimated net charge to capital account
Georgia Division	\$3,338	\$2,069
South Carolina Division	5,788	5,345
South Florida Division	240	240
Totals	\$9,366	\$7,654

411 **AFE No. LR-5242.** (1 Project.) Rebuilding overhead highway bridge over the tracks and property of defendant Railway Company at Bracey, Va., on the Richmond-Norlina line.

This overhead highway bridge was built by the Railway at the time of original construction of this line. It is an untreated timber structure, 40 feet high and over a deep cut at this point. Defendant Railway Company has maintained this bridge in the past, same having been rebuilt by it in 1926 and minor repairs made since that time; however, it has now reach the point where it is necessary to again rebuild it to insure safety of operation. Plans provide for replacing it with a steel structure, using second-hand materials salvaged from one of the steel bridges recently rebuilt on the Richmond line, which will provide the most economical and permanent structure.

Estimated gross cost of project \$4,879
Estimated net charge to capital account 3,929

AFF No. LR-5243. (1 Project.) Rebuilding overhead highway bridge over the tracks and property of defendant Railway Company at Cochran, Va., on the Richmond-Norlina line. This overhead highway bridge was built by the Railway many years ago and has been maintained by it since that time. It is an untreated timber structure, 25 feet high. It has now reached the point where it can no longer be repaired and will have to be rebuilt to insure safety of operation. Plans provide for renewing it with creosoted timber structure.

Estimated gross cost of project \$2,150
Estimated net charge to capital account 923

AFF No. LR-20033-FW&N. (1 Project.) Placing rip rap stone around trestle abutments at one location, on the line of Florida Western & Northern Railroad Company, between Coleman and West Palm Beach, Fla., to protect abutments from being washed away during high water.

Estimated gross cost of project \$485
Estimated net charge to capital account 485

Budget Item No. 9.—Ballast:

AFFs Nos. LR-5244 to LR-5255, inclusive. (12 Projects.) Placing approximately 52,520 tons of ballast necessary for maintenance to fill in open track where track has been or will be slightly raised in surfacing.

Location	Number of tons	Estimated gross cost	Estimated net charge to capital account
Virginia Division	8,000	\$10,800	\$10,000
North Carolina Division	18,100	22,715	20,000
Georgia Division	21,420	24,923	22,498
South Carolina Division	5,000	10,700	10,000
Totals	52,520	\$69,138	\$62,498

Budget Item No. 15.—Traffic Facilities:

AFE No. LR-5256. (1 Project.) Location: Orlando, Fla. Construction of 30 x 130' extension to existing packing house, including 1176 square feet of new platform, also re-location of existing track.

It is necessary for the Receivers to provide these facilities to take care of increasing freight business of their present tenant and to avoid loss of this business to a competitor of the Receivers. This project contemplates lease of the enlarged packing house and platform and site thereof to this tenant for a period of five years, at an annual rental deemed by the Receivers to be fair and reasonable, and under lease agreement approved by the Receivers with the advice of their counsel and containing appropriate routing and other clauses protective of the interests of the receivership estate. The Receivers are advised by their Traffic Department such lease of this property by them will result in a very substantial increase in the annual freight revenue, and in the judgment of the Receivers the benefits to accrue to the receivership estate will fully justify the cost of this project.

Estimated gross cost of project	\$6,125
Estimated net charge to capital account	5,725

The projects under AFEs Nos. LR-5220 to LR-5256, inclusive, as set forth in Budget Items Nos. 1, 3, 7, 8, 9 and 15, cover work or projects during the year 1935, for the work of repairs, renewals, replacements, improvements, etc., on the lines of railroad and property owned by defendant Railway Company and in the Receivers' possession and control. AFE No. LR-20031-CofGa. covers like project included in Budget Item No. 7 on the line of railroad between Meldrim and Lyons, Georgia, leased by defendant Railway Company from Central of Georgia Railway Company and operated by the Receivers as a part of the railroad of defendant Railway Company, and AFE No. LR-20033-FW&N covers a like project included in Budget Item No. 8, on the line of railroad of Florida Western & Northern Railroad Company. The operation by the Receivers of the line of railroad of Florida Western & Northern Railroad Company is being continued by them pursuant to the terms of Order No. 13 of this Court (Printed Receivership Record, pp. 1059, et seq.), entered on February 28, 1931, on the Receivers' Application No. 13, which sets forth the terms and conditions upon which the Receivers are authorized to continue their operation of said last mentioned line of railroad and to the terms of Orders of this Court Nos. 31 and 48, dated, respectively, June 30, 1931 and September 28, 1931, modified by Order No. 75, dated June 17, 1932, and as further modified by

Order No. 93, dated December 21, 1932 (Printed Receivership Record, pp. 2656, et seq., 2979, et seq., 4343, et seq., and 5045, et seq., respectively).

In the opinion of the Receivers the projects under the several above mentioned AFEs, as set forth in this Section I under the respective Budget Items Nos. 1, 3, 7, 8, 9, and 15, are necessary for the safe, proper, efficient, and economical preservation, management, maintenance, and operation of the railroads and properties in their possession and control.

The Receivers therefore recommend that they be authorized to carry out and perform all of the projects and to pay in each case the necessary cost thereof out of funds heretofore or hereafter in their possession as Receivers, as and when such funds become available for such purpose, including the part of such cost chargeable to capital account and estimated, for all of the projects as set forth under the above stated respective budget item numbers, to be \$97,679 in the aggregate so chargeable.

413

II

Subject to the authorization of the Court, the Receivers have included in their program of additions and betterments (Budget Item No. 16 thereof—Industrial and Emergency Items) for the months of October, November, and December 1935, the sum of \$37,500, representing the estimated requirements for these months to cover the cost, chargeable to capital account, of the work or projects of construction of industrial tracks, tracks for shippers, team tracks, small loading sheds, driveways, and other facilities of the character set forth in Section I of said Application No. 5 and in Section I of the order of the Court thereon entered herein, for the handling of existing and new business and/or other necessary repair, renewal, and replacement work or projects on the railroads owned by, and on the railroads (other than those of Seaboard-All Florida Railway, Florida Western & Northern Railroad Company, and East and West Coast Railway, hereinafter collectively referred to as "Seaboard-All Florida Line") leased to defendant Railway Company and now and since December 23, 1930, in the Receivers' possession and control.

By Order No. 167 of this Court (Printed Receivership Record pp. 9697, et seq.) entered herein on August 12, 1935, upon Application No. 167 of the Receivers, the Receivers were authorized to expend, as a part of their program for the months of July, August, and September 1935, not exceeding \$6,000 in any one case or project of the character mentioned in Section II of Application No. 167 and in Section II of this application, but not exceed-

ing, except and in the event of the future order of the Court, the sum of \$37,500 in the aggregate for all of such work or projects.

The Receivers recommend that they be authorized to carry out and perform for the months of October, November, and December 1935, such work or projects on the railroads owned by, and the railroads (other than said Seaboard-All Florida Lines) heretofore leased to defendant Railway Company, as in their judgment the necessity requires and to pay, in addition to any unexpended portion of the sum or sums heretofore authorized by Order No. 167, and or by previous orders of the Court entered herein for like work or projects, not exceeding \$6,000, chargeable to capital account, in any one case or project, and not exceeding, unless authorized by future order of the Court, \$37,500 in the aggregate in addition to any unexpended sums heretofore authorized.

III

Agreement supplementing existing General Agreement with The Western Union Telegraph Company

Pursuant to the authority contained in Order No. 142 of the Court, filed herein June 7, 1934 (Printed Receivership Record, pp. 7635, et seq.), upon the Receivers' Application No. 142, and substantially identical order of the United States District Court for the Southern District of Florida, filed herein June 7, 1934 (Printed Receivership Record, pp. 7645, et seq.), upon the Receivers' application to said last-mentioned Court, filed 414 June 7, 1934, the Receivers and defendant Railway Company, and certain of the subsidiary companies of defendant Railway Company and the Receivers thereof, entered into agreement (hereinafter called "General Agreement") with The Western Union Telegraph Company (hereinafter called "Telegraph Company"), dated June 1, 1934, effective on and after that date, for the term, containing the reciprocal service provisions and otherwise as set forth in said applications and as authorized by said orders.

The General Agreement by its terms applies, upon the conditions set forth therein, to the lines of railroad of defendant Railway Company and of its subsidiary companies, parties thereto, listed in Schedule B, attached as a part of the General Agreement, and to telegraph lines used thereon, but does not extend or apply to Baltimore Steam Packet Company (hereinafter called "Bay Line"), a steamship company which operates vessels in freight and passenger transportation service between the ports of Norfolk, Va., and Baltimore, Md., and all of whose capital stock is owned by defendant Railway Company and

pledged under its Refunding Mortgage, dated October 1, 1909, and, subject to such pledge, under its Adjustment Mortgage, dated October 1, 1909. Subject to the approval of the Court, the Receivers and defendant Railway Company have entered into agreement with the Telegraph Company, to which the subsidiary companies of defendant Railway Company parties to the General Agreement, and the Bay Line, are also parties, dated August 1, 1935, effective on and after June 1, 1935, so supplementing, modifying, and amending the General Agreement as to secure to the Bay Line the benefit of grant by the Telegraph Company of an annual telegraphic allowance, to be charged against the aggregate annual allowance granted by the Telegraph Company under the General Agreement and in an amount which will, in the judgment of the Receivers, meet the requirements of the Bay Line, such telegraphic allowance to the Bay Line to be in exchange for grant by it to the Telegraph Company of a like amount of transportation via the Bay Line for employees of the Telegraph Company when traveling on its business. Under the contract, the excess amount, if any, of telegraphing done by the Bay Line, or of such passenger transportation furnished to the Telegraph Company, is to be paid for at regular tariff rates. The supplemental agreement provides for its continuance during the life of the General Agreement, with a further provision therein that if during such period the Bay Line should cease to be owned or controlled by defendant Railway Company or its successors, or by the railroad company which may upon the termination of the receivership of defendant Railway Company own or control all, or substantially all, of the lines of railroad owned by defendant Railway Company and now in possession of the Receivers, then, as and when such cessation of ownership or control of the Bay Line shall occur, the supplemental agreement shall thereupon simultaneously terminate. The Receivers have also, in connection with said Supplemental Agreement, entered into a separate contract, for a period coextensive with such Supplemental Agreement, with the Bay Line providing for reimbursement of the Receivers by the Bay Line, on a basis deemed by the Receivers to be mutually fair and reasonable, if and when during the continuance of the Supplemental Agreement the annual aggregate allowance granted by the Telegraph Company under the General Agreement is for any contract year exceeded and the Receivers should be required under the General Agreement provisions, on account of such excess, to make any money payment to the Telegraph Company.

In the judgment of the Receivers, the arrangement for which this Supplemental Agreement provides will effect a considerable annual saving to the Bay Line in operating expenses and is in

the interest of the receivership estate of defendant Railway Company.

Accordingly, the Receivers recommend that their action, and the action of defendant Railway Company, in entering into agreement with the Telegraph Company supplementing and amending the General Agreement as above set forth, be authorized, ratified, and approved, and that the Receivers and defendant Railway Company be authorized to carry out and perform all of the covenants and obligations of the Receivers and defendant Railway Company, on their respective parts to be carried out and performed, under and by virtue of the General Agreement, as so supplemented and amended.

IV

Lease by the Receivers of certain additional coal lands

The Receivers refer to Section V of their Application No. 146, filed herein July 31, 1934 (Printed Receivership Record, pp. 7823, et seq.), setting forth their action in two instances, in order to insure adequate coal supply and to effect necessary economies in the cost of coal to the receivership estate, in leasing directly from the landowners the right to take from the land a specified minimum and maximum tonnage of coal for use by the Receivers, upon payment by the Receivers of rent or royalty at the rate per ton customarily charged by such landowners in their lease of such rights, also the action of the Receivers in connection with each of such transactions in entering into contract with an independent contractor, in each case for a period coextensive with the term of such lease, or extensions or renewals thereof provided for in the lease, for the service and work of mining, producing, and loading the coal on railroad cars at the mine for shipment to the Receivers. The Court in and by Section V of its Order No. 146 upon Section V of said application authorized, ratified, and approved the action of the Receivers in entering into such lease and in so contracting with the independent contractor, in each case. In the judgment of the Receivers such leases and contracts so entered into by them have resulted in substantial savings in the cost of coal and consequent benefit to the receivership estate.

Subject to ratification by the Court, the Receivers have since, and for the same reasons as are above referred to, in another instance leased directly from the owner the right to take from the land, located in another coal field, a specified minimum and maximum tonnage of coal for use by the Receivers, upon payment by the Receivers of the customary royalty or rent
 416 per ton, such lease by the Receivers being for the period from September 1, 1935, to September 1, 1936, renewable

at the option of the receivers after September 1, 1936, and up to and including September 1, 1940. The Receivers have also, in connection with this transaction, and subject to ratification by the Court, contracted with an independent contractor, for a period coextensive with such lease, for the service and work of mining, producing, and loading on railroad cars at the mine for shipment to the Receivers the coal so mined, produced, and loaded. Said lease and said agreement with the independent contractor are each upon and subject to terms and conditions satisfactory to the Receivers and approved by their counsel.

The Receivers recommend:

(1) That their action in entering into, in the further instances mentioned in this section of this application, said lease and said agreement with the independent contractor, be ratified and approved by the Court.

(2) That if the order of the Court upon this section of this application shall ratify and approve said action by the Receivers, said order declare and provide (i) that the receivership of defendant Railway Company shall not be terminated nor the receivership estate thereunder surrendered by the Receivers, their successor or successors, unless as a condition of such termination or surrender, all of the unperformed obligations of the Receivers then existing or to accrue, including all payments by the Receivers then due or thereafter to become due, under or by virtue of said lease and agreement, or either of them, shall be assumed by defendant Railway Company or other corporation that shall succeed the Receivers in the possession of substantially all of the lines of railroad comprised in the receivership estate; (ii) that in case of any sale or conveyance of substantially all of said lines of railroad the purchaser, or transferee of the purchaser, shall not be at liberty either to refuse or accept the performance of said obligations, but if acquiring substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose of reorganization, any such purchaser shall not incur any personal liability on or in respect of said obligations, provided such corporation to which substantially all of the said lines of railroad are so transferred in such reorganization shall assume said obligations; and (iii) that in case any corporation, prior to the maturity and payment of any of said obligations, shall succeed the Receivers in the possession and control of substantially all of said lines of railroad (whether defendant Railway Company or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all of said obligations of the Receivers, the Receivers shall thereupon be relieved from all further liability on or in respect of said obligations.

V

Agreement with Dr. W. R. Tuten concerning power plant dam and spillway located near right of way of defendant Railway Company at Sycamore, S. C.

Some months ago the Receivers were informed of the
417 intention of Dr. W. R. Tuten, of Fairfax, S. C., the owner of land on both sides of Deer Mill Creek (or Jackson's Branch), near Sycamore, S. C., to erect a dam and power plant at a point about 4,000 feet east of the track of defendant Railway Company which crosses the Creek on Trestle numbered 431.7.

The Receivers were advised that Dr. Tuten asserted the legal right to erect the dam and spillway and as a result thereof to impound water and overflow the adjacent right-of-way and property of defendant Railway Company. While the Receivers deny such right, it has developed that the proposed plan is to be used for the manufacture of ice and is expected to be of considerable benefit to the neighboring farmers. In order to avoid extended and expensive litigation over the matter and the neighborhood ill feeling which would result therefrom the Receivers deemed it advisable and in the interest of the receivership estate to amicably settle the matter with Dr. Tuten. Accordingly, subject to the approval of the Court, the Receivers propose to enter into agreement with him which will, in connection with the project, permit the overflow of the right-of-way and property of defendant Railway Company to a limited extent, and contain other provisions which, in the judgment of the Receivers, will be sufficiently protective of the interests of the receivership estate. The agreement will also provide that, subject to any right to cancel or terminate same as provided therein or given by law, the provision thereof shall be binding upon and shall inure to the benefit of the Receivers (as Receivers, but not individually) and their successors, the defendant Railway Company and its successors, the railroad corporation which may, after the termination of the receivership of defendant Railway Company, control and operate the line of railroad and appurtenant physical properties on or along which the property to be covered by the agreement is located, and/or to the business of which the subject matter of the agreement relates, and the successors of such railroad corporation.

The Receivers recommend that they be authorized (a) to make and enter into said agreement, same to be in the form, and to contain such provisions in line generally with those above set forth, as shall be approved by the Receivers, with the advice of their counsel, and (b) to carry out and perform all obligations assumed by the Receivers under or referable to said agreement and on their part to be carried out and performed.

VI

Additions and betterments on railroad of Georgia, Florida & Alabama Railroad Company

The Receivers herein refer to Section X (Printed Receivership Record, pp. 9159, et seq.), of their Application No. 161, filed herein on March 4, 1935, and to Section IV (Printed Receivership Record, pp. 9501, et seq.), of their Application No. 165, filed herein on June 17, 1935, in respect of additions and betterments on the railroad of Georgia, Florida & Alabama Railroad Company, hereinafter called "GF&A." As set forth in said sections, the Receivers herein, acting under and pursuant to the therein mentioned orders of this Court, and the orders confirmatory thereof of the United States District Court for the Southern District of Florida (hereinafter called "Florida Court"), entered in the ancillary receivership proceedings of defendant Railway Company therein pending, have heretofore disaffirmed the lease of the properties of the GF&A to defendant Railway Company.

As further stated in said sections, order of the Florida Court entered October 23, 1934 (Printed Receivership Record, pp. 8228, et seq.), upon the petition of the Receivers filed pursuant to Order No. 143 of this Court, dated July 6, 1934 (Printed Receivership Record, pp. 7689, et seq.), and which order of the Florida Court dated October 23, 1934, by the terms of said Order No. 143 of this Court, stands ratified, approved and confirmed by this Court, decreed, among other things, that operation by the Receivers herein of the GF&A properties since December 23, 1930, the date of the original appointment of the Receivers herein, has been for account of the GF&A and its Receivers, and further decreed that, in the event the GF&A and/or the Receivers of its properties should fail or refuse on or before November 30, 1934, to take possession of the properties of the GF&A, the continued operation thereof after that date by the Receivers herein shall, subject to the right of the Florida Court and of this Court by future order, to direct the cessation of such operation at any time, be upon and subject to the express conditions set forth in said order dated October 23, 1934, of the Florida Court. The GF&A or its Receivers having failed to take possession of its properties on or before November 30, 1934, the Receivers herein have, since that date, continued their operation thereof upon and subject to the above-mentioned orders of this Court and of said order entered October 23, 1934, of the Florida Court. Paragraph (D) of said last mentioned order provides, among other things, that upon failure or refusal, which

has occurred, of the GF&A or its Receivers to re-take possession of the GF&A properties on or before November 30, 1934, that the GF&A and also its Receivers, and the Trustees under its Indenture of Mortgage dated August 1, 1927, and all parties claiming by, through or under the GF&A, or its Receivers or Mortgage Trustees, shall be conclusively deemed to have acquiesced and consented that a lien or charge shall exist on the properties of the GF&A in the possession of the Receivers herein senior to the lien of said Indenture of Mortgage of the GF&A to secure the reimbursement of the Receivers herein for all amounts heretofore expended by them and chargeable to capital account, for additions and betterments or improvements made by the Receivers herein to the properties of the GF&A, and for all such amounts hereafter expended by them and chargeable to capital account for additions and betterments as are authorized and approved by this Court and the Florida Court, or either of said Courts, after notice to the GF&A and its Receivers and to the Trustees under the said Indenture of Mortgage, and otherwise heretofore or hereafter expended for the account of the GF&A and hereafter decreed by this Court and the Florida Court, or either of said Courts, to be chargeable against the GF&A.

419 Since December 23, 1930, the date of original appointment of the Receivers herein, in their operation of the properties of the GF&A for account of the GF&A and its Receivers, it has been necessary for the Receivers herein, in connection with the ordinary and regular maintenance of said properties, to incur certain charges to capital account for what is known as Minor Betterments. Under the cost accounting practice, such charges are currently made and at the end of each six months' period are consolidated, formal authority for the expenditure being issued. These small projects are not a part of any program and, in most cases, due to the nature thereof and the circumstances under which they are carried out, it is impracticable to anticipate the necessity, and to obtain in advance authority, therefor. Capital account charges of this character, representing expense of Minor Betterment work or projects on or in respect of the properties of the GF&A, in the respective aggregate amounts and during the respective periods indicated below, have necessarily been incurred by the Receivers herein:

(1) AFEs Nos. LR-20029-GF&A to LR-20032-GF&A, inclusive. (4 Projects.) Location: System. Minor Betterments (years 1933 and 1934, and six months period ending June 30, 1935):

Estimated gross cost of project.....	\$456
Estimated net charge to capital account.....	456

The amounts set forth above were brought about in connection with the regular maintenance work of installing guard rail clamps, guard rail plates, derailleurs, and switch stand plates to promote greater safety in operations.

(2) AFE No. LR-20033-GF&A. (1 Project.) Location: System. Application of 2-inch metallic steam heat connections to eight GF&A passenger train cars. Passenger Car Rule No. 2 of the A. A. R., as recently amended, provides that "effective January 1, 1937, cars other than passenger carrying equipment, not equipped with metallic steam heat connectors having two-inch openings throughout, will not be accepted in interchange. Effective January 1, 1937, no car of passenger carrying equipment, not equipped with metallic steam heat connectors having two-inch openings throughout, will be accepted in interchange." In compliance with this Rule, the Receivers have been applying these connectors to equipment of the Receivers since 1932, the work being done as the cars went through the shops for heavy repairs; in so doing it is now found that applications have been made to six of the GF&A cars.

Estimated gross cost of project.....	\$392
Estimated net charge to capital account.....	206

(3) AFE No. LR-29034-GF&A. (1 Project.) Location: System. Application of Brake System Badge Plates to 278 GF&A Freight Train Cars. Rule No. 3 of the Mechanical Division of the A. A. R. requires that when freight cars are given heavy repairs, that a small iron plate about eight inches long and four inches wide be attached to one side of the car, on which is shown diagram of the brakes and brake lever system. In compliance with this Rule, the Receivers are applying these plates to all freight cars as they go through the shops for heavy repairs and it is found that in so doing plates have been applied to 164 of the GF&A freight cars. The cost per car is 63.1c and to comply with the A. A. R. Rule it is necessary that we make this application to the entire GF&A freight car ownership of 278 cars.

Estimated gross cost of project.....	\$175
Estimated net charge to capital account.....	175

In addition to the above stated Minor Betterments, in the judgment of the Receivers herein it is necessary for them, in their continued operation of the properties of the GF&A upon and subject to the provisions of said order of this Court and said Florida Court, and for the proper, efficient, and economical management, maintenance, and operation thereof by them, to carry out and perform the following addition and betterment project on the line of railroad of the GF&A:

(4) AFE No. LR-20028-GF&A. (1 Project.) Location: Mile Post 0.5, Tallahassee-Carrabelle Line. Replacing present 36-inch culvert pipe line under track with 37½ foot open deck trestle. During recent high water, washout occurred at this point due to inability of the present 36-inch pipe line, which is under a 12-foot fill, to take care of the flow of water through it. The normal flow of water through this pipe has recently been materially increased due to ditching work performed by civic authorities in connection with a drainage area that drains under our track at this point. The Receivers have made temporary repairs to permit passing of trains in connection with washout above referred to, but to permanently fix this situation and insure safety of operations it is necessary to construct 37½-foot open deck trestle in lieu of the existing pipe line. This will provide ample opening under the track to take care of the flow of water at this point at all times, and is the most economical and permanent arrangement:

Estimated gross cost of project.....	\$924
Estimated net charge to capital account.....	\$39

The Receivers herein recommend that the order of the Court upon this section of this application:

(a) Ratify and approve the action of the Receivers herein in carrying out and performing, under AFEs Nos. LR-20029-GF&A to LR-20034-GF&A, inclusive, the respective projects above set forth in sub-divisions (1), (2) and (3) of this section, and in paying in each case out of funds in their hands as Receivers the cost of the project chargeable to capital account as set forth in said sub-divisions and amounting to \$456, \$296, and \$175, respectively, so chargeable, be ratified and approved; and

(b) Authorize the Receivers herein to carry out and perform, under AFE No. LR-20028-GF&A, the project above set forth in sub-division (4) of this section, and to pay out of funds in their hands as Receivers, in each case, the cost of the project chargeable to capital account, as in said last mentioned subdivision set forth, and estimated to be \$639 so chargeable; such ratification, approval, and authorization by this Court to be subject to an order of the

Florida Court confirmatory of the order of this Court upon this section of this application, entered in the ancillary receivership proceedings of defendant Railway Company therein pending after notice duly given to the GF&A and its Receivers and to Bankers Trust Company and R. Gregory Page, as Trustees of the said GF&A Mortgage, of the time and place of presentation to the Florida Court of the application of the Receivers herein to that Court for order of the Florida Court confirmatory of the order of this Court and of the order of the Florida Court proposed to be entered upon such application.

VII

Contract with Southern Railway in respect of rates on certain trackage

The Receivers, since their original appointment on December 23, 1930, have continued, in their operation of the properties of defendant Railway Company in their possession and control, to use certain tracks owned by Southern Railway Company at Atlanta, Ga., the use of which was granted by that Company to defendant Railway Company under agreement dated August 11, 1916, for the purpose of reaching the Atlanta, Ga., Terminal Station. Since such original appointment, Southern Railway Company has continued to use, under agreement between it and defendant Railway Company dated March 24, 1915, effective on and after April 1, 1914, certain tracks of defendant Railway Company at Richmond, Va., for the purpose of reaching the Main Street passenger station at that point owned jointly by defendant Railway Company and The Chesapeake and Ohio Railway Company, and in connection with the use by Southern Railway Company of said last mentioned station. The Atlanta, Ga., trackage agreement, under its terms, is for a period of one year from its date and thereafter until termination by either party thereto on six months' notice. The Richmond, Va., trackage agreement by its terms is for a period of twenty-five years from April 1, 1914, and thereafter until terminated by either party upon one year's notice. The Receivers have continued to use the above-stated tracks of Southern Railway Company at Atlanta, Ga., and that Company has continued to use the above-mentioned tracks of defendant Railway Company at Richmond, Va., pending the action of the Receivers in adopting or disaffirming said agreements, respectively.

Subject to the approval of the Court, the Receivers have agreed with Southern Railway Company that, effective on September 1, 1935, and during the period of five years thereafter, the trackage rate payable by the Receivers for the use of the Atlanta, Ga., tracks will be reduced from 50c to 35c per car, and the minimum charge for one movement from \$2.00 to \$1.40, and that, effective on said date and during the period of the remainder of the 25-year term of the Richmond, Va., trackage agreement, the trackage rate payable by Southern Railway Company under said last-mentioned agreement will be reduced from 38c to 26.6c per car, and the minimum charge for a single movement from \$1.53 to \$1.07. Based on movements in the year 1934, this arrangement will result in a net saving to the receivership estate of approximately

\$6,675 per annum. The Receivers recommend that they be
 422 authorized to enter into appropriate agreement with South-
 ern Railway Company providing for the above-stated re-
 ductions, same to be effective on and after September 1, 1935, and
 to continue in effect in each case for the respective periods above
 stated, the agreement to also provide that same shall be binding
 upon and inure to the benefit of the Receivers (as Receivers, but
 not individually) and their successors, defendant Railway Com-
 pany and its successors, the railroad corporation which may,
 after the termination of the receivership of defendant Railway
 Company, control and operate the line of railroad and appur-
 tenant physical properties on or along which the property cov-
 ered by the agreement is located, and to the business of which
 the subject matter of the agreement relates and the successors
 of such railroad corporation.

Wherefore, the Receivers pray for the authority and instruc-
 tions of the Court in the premises.

LEGH R. POWELL, JR.,

HENRY W. ANDERSON,

Receivers.

By LEGH R. POWELL, JR.,

Receiver.

Dated at Norfolk, Virginia, September 13, 1935.

Approved:

TAEWELL TAYLOR,

W. R. C. COCKE,

HAROLD J. GALLAGHER,

Counsel for Receivers.

STATE OF VIRGINIA,

City of Norfolk, ss:

Legh R. Powell, Jr., being first duly sworn, deposes and says
 that he is one of the Receivers named in the foregoing applica-
 tion and that he has read the foregoing application and knows
 the contents thereof, and that the same are true to the best of
 his knowledge and belief.

LEGH R. POWELL, JR.,

Receiver.

Subscribed and sworn to before me this 13th day of September,
 1935,

[NOTARIAL SEAL]

M. E. CARROLL,

Notary Public.

My Commission Expires March 4, 1936.

Filed September 17, 1935.

C. P. BREESE, JR.,

Deputy Clerk.

In the District Court of the United States for the Eastern
District of Virginia

Consolidated Cause. In Equity, No. 214

GUARANTY TRUST COMPANY OF NEW YORK AND MERREL P.
CALLAWAY, AS TRUSTEES, ET AL., COMPLAINANTS

against

SEABOARD AIR LINE RAILWAY COMPANY, ET AL., DEFENDANTS

And in the Constituent Causes Numbered 213, 214, 228, and 229
of Said Consolidated Cause

ORDER IN RESPECT OF ADDITIONS AND BETTERMENTS AND
MISCELLANEOUS MATTERS

The Application No. 168 of Legh R. Powell, Jr., and Henry W. Anderson, the Receivers herein, in respect of the matters set forth in Sections I to VII, inclusive, of the application, this day filed, coming on for hearing, and it appearing that notice of the time and place of presentation of said application and the order to be entered thereon has been duly served upon the Solicitors of Record for all the parties to this Cause, no objection having been made and counsel having been heard, and it being the opinion of the Court and the Court so finding that the recommendations and requests of the Receivers in said sections of said application are proper and in the interest of the receivership estate, it is accordingly

Ordered, adjudged, and decreed:

I

That the action of the Receivers in approving the work and projects as set forth in Section I of the application under AFE Nos. LR-5220 to LR-5256, inclusive, under Budget Items Nos. 1, 3, 7, 8, 9, and 15, under AFE No. LR-20031 CofGa., under Budget Item No. 7, and under AFE No. LR-20033-FW&N, under Budget Item No. 8, at an estimated charge to capital account in the case of each of said projects of the amount included and set forth in said items, respectively, and at an estimated net charge to capital account for all of said items of \$97,679, and the expenditure by the Receivers of the aforesaid amounts, be, and the same are hereby, in all respects, authorized and approved.

II

That the action of the Receivers in including in their additions and betterments program for the months of October, November, and December, 1935, the sum of \$37,500 to cover the aggregate estimated net cost, chargeable to capital account, for work or projects of the character set forth in Section II of 424 the application, on the lines of railroad and properties in their possession and control (other than the railroads and properties of Seaboard-All Florida Railway, Florida Western & Northern Railroad Company and East and West Coast Railway, hereinafter collectively referred to as "Seaboard-All Florida Lines"), be, and the same is hereby, in all respects, approved, and the Receivers be, and they are hereby, authorized, as in their judgment the necessity requires, to carry out and perform said work and projects, all as set forth in said Section II of the application, on or in respect of the railroads and properties (other than those of the Seaboard-All Florida Lines) owned by or leased to defendant Railway Company and in the Receivers' possession and control, at an estimated net charge to capital account of not exceeding the sum of \$6,000 in any one case or for any one project and not exceeding, except and in the event of the future order of the Court, the sum of \$37,500 for all of said work or projects on said owned or leased railroads and properties other than those of the Seaboard-All Florida Lines; and the expenditure by the Receivers of the aforesaid amount of \$37,500 (in addition to the unexpended portion of any sum or sums authorized by any and all orders of the Court heretofore entered in this cause, and or in any of the Constituent Causes hereof, to be expended by the Receivers for like work or projects on said owned or leased railroads and properties), be, and the same is hereby, in all respects, authorized and approved.

III

Any and all advances or expenditures authorized in and by the provisions of Sections I and II of this order made by the Receivers with respect to any of the properties leased to defendant Railway Company, in the possession and control of and being operated by the Receivers, shall be, and said sections of this order are entered, without prejudice to or waiver of the right of the Receivers to hereafter disaffirm and reject such lease, and any and all such advances or expenditures on or in respect of said leased properties pursuant to the provisions of said sections of this order shall be made, and this order is entered, without prejudice to the right of the Receivers to receive reimbursement

from any such lessor company for the amount of such advances or expenditures made on or in respect of the properties thereof. The Court hereby expressly reserves (a) the right to require repayment to the Receivers or to the receivership estate of Seaboard Air Line Railway Company of any and all such amounts as a condition precedent to surrender by the Receivers of the property of any such lessor, and (b) the further right, in and by future order of the Court, to provide and declare that until the repayment to the Receivers of the amount of such advances or expenditures made on or in respect of the properties of such lessor company, such amount shall be secured by a first and paramount lien prior to all other mortgage or other liens, upon the properties of such lessor company.

Any and all advances or expenditures authorized by the provisions of Section I of this order, made by the Receivers in respect of the properties of Florida Western & Northern Railroad Company shall be made, and this order is entered, without
425 prejudice to the right of the Receivers to receive reimbursement from Florida Western & Northern Railroad

Company for the amount of such advances or expenditures with respect to its line of railroad or property. The Court hereby expressly reserves (a) the right to require repayment to the Receivers or the receivership estate of Seaboard Air Line Railway Company of such amount as a condition precedent to surrender by the Receivers of the properties of Florida Western & Northern Railroad Company now in the possession and control of the Receivers, and (b) the further right, by future order of the Court, to provide and declare that until the repayment to the Receivers of the amount of such advance or expenditure, made with respect to the properties of Florida Western & Northern Railroad Company, the amount or amounts of such advances or expenditures with respect to the properties of such companies, shall be secured by a first and paramount lien upon the properties of such company, ranking *pari passu* with the lien of the Receivers' Certificates, issued or to be issued by the Receivers of Seaboard-All Florida Railway, Florida Western & Northern Railroad Company, and East and West Coast Railway pursuant to Order No. 8 entered June 30, 1932, of the United States District Court for the Southern District of Florida, in the cause therein pending entitled "Bankers Trust Company and John T. Flynn, Complainants, against Seaboard-All Florida Railway, Florida Western & Northern Railroad Company, East and West Coast Railway, and Seaboard Air Line Railway Company, Defendants," in Equity No. 797, Eq. J., and shall rank prior to all other mortgage or other liens on said properties.

IV

That the action of the Receivers and of defendant Railway Company in entering into agreement dated August 1, 1935, effective on and after June 1, 1935, so supplementing and amending the existing General Agreement of the Receivers, defendant Railway Company and other parties thereto, with The Western Union Telegraph Company, dated June 1, 1934, as to provide for grant by the Telegraph Company to Baltimore Steam Packet Company of an annual telegraphic allowance in exchange for a like amount of annual passenger transportation allowance via the steamship line of Baltimore Steam Packet Company, and otherwise providing, as set forth in Section III of the application, be, and said action is hereby, in all respects, authorized, ratified, and approved.

The Receivers and defendant Railway Company are authorized to carry out and perform all of their respective covenants and obligations, on their respective parts to be carried out and performed, under and by virtue of said General Agreement, as so supplemented and amended.

V

That the action of the Receivers in leasing the right to take coal from the land for use of the Receivers, in the third instance referred to in Section IV of the application and, in connection with such transaction, in contracting with an independent contractor for the service and work of mining, producing, and loading the coal on railroad cars for shipment to or
426 for account of the Receivers, as set forth in said Section IV, be, and said action is hereby, ratified and approved.

The receivership herein shall not be terminated, nor the receivership estate thereunder surrendered by the Receivers herein, or their successor or successors, unless as a condition of such termination or surrender all of the unperformed obligations of the Receivers then existing or to accrue under or by virtue of said lease and agreement, or either of them, referred to in this Section V of this order, including all payments by the Receivers then due or thereafter to become due thereunder, shall be assumed by defendant Railway Company or other corporation that shall succeed the Receivers in possession of substantially all the lines of railroad comprised in the receivership estate. In case of any sale or conveyance of substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose or reorganization any such purchaser shall not incur any personal liability on or in respect of such obligations, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume

said obligations, including all payments by the Receivers then due and unpaid, or thereafter to accrue, under or by virtue thereof. In case any corporation shall, prior to the maturity and payment of all of said obligations, succeed the Receivers in the possession and control of substantially all of said lines of railroad (whether defendant Railway Company or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all of said obligations of the Receivers, the Receivers shall thereupon be relieved from all further liability on or in respect of said obligations.

VI

That the Receivers are authorized (a) to enter into agreement with Dr. W. R. Tuten, as recommended in Section V of the application, the agreement to contain such provisions, generally in line with those set forth or referred to in said Section V, as shall be approved by the Receivers, with the advice of their counsel, and (b) to carry out and perform all obligations assumed by the Receivers under or referable to said agreement and on their part to be carried out and performed.

VII

That the action of the Receivers in carrying out and performing, under AFEs Nos. LR-20029-GF&A to LR-20034-GF&A, inclusive, the respective Minor Betterment projects on the railroad of Georgia, Florida & Alabama Railroad Company (hereinafter called "GF&A"), set forth in subdivisions (1), (2), and (3) of Section VI of the application, and in paying, in each case, out of funds in their hands as Receivers, the cost of the project, chargeable to capital account, as set forth in said subdivisions, and amounting to \$456, \$296, and \$175, respectively, so chargeable, be, and said action is hereby, in all respects, ratified and approved.

427 The Receivers are authorized to carry out and perform, under AFE No. LR-20028-GF&A, the addition and betterment project on the railroad of the GF&A, set forth in subdivision (4) of Section VI of the application, and to pay out of funds in their hands as Receivers, the cost of the project, chargeable to capital account, as in said last-mentioned subdivision set forth, and estimated to be \$639 so chargeable.

The provisions of this Section VII and the authority herein granted to the Receivers are conditioned upon the entry by the United States District Court for the Southern District of Florida (hereinafter called "Florida Court") in the ancillary receivership cause of defendant Railway Company therein pending, of an order confirmatory of this Section VII of this order, and after

notice shall have first been given to the GF&A, its Receivers and Bankers Trust Company and R. Gregory Page, as Trustees of the GF&A Indenture of Mortgage dated August 1, 1927, of the time and place of presentation to the Florida Court of the application of the Receivers herein to that Court for order of the Florida Court confirmatory of this Section VII of this order, and of order of the Florida Court confirmatory of this Section VII proposed to be entered upon such application of the Receivers to the Florida Court.

VIII

That the Receivers are authorized (a) to enter into agreement with Southern Railway Company, as recommended in Section VII of the application, such agreement to provide for the reductions in trackage rates and to continue the other provisions, as stated or referred to in said Section VII, and (b) to carry out and perform all obligations assumed by the Receivers under or referable to said agreement and on their part to be carried out and performed.

IX

Nothing contained in this order shall, as between the holders of claims and demands against defendant Railway Company for which a preference or priority in the payment thereof is asserted and the Trustees of the mortgages secured by lien upon the properties of said Railway Company, be considered a determination as to whether or not the payments hereby authorized will constitute a diversion of income for the benefit of the mortgage security, such questions and all kindred questions being reserved for future determination by the Court after hearing all parties in interest.

LUTHER B. WAY,

United States District Judge

Dated at Norfolk, Virginia,

September 17, 1935.

Approved:

TAZEWELL TAYLOR,

W. R. C. COCKE,

HAROLD J. GALLAGHER,

Counsel for Receivers.

Entered and filed September 17, 1935. C. P. Breese, Jr., Deputy Clerk.

NOTE.—Copy of Application No. 168 and Order No. 168 entered thereupon identical with those here printed with notice that they would be presented to the Court on September 17, 1935, at 9:30

o'clock A. M., or as soon thereafter as Counsel could be heard, were on September 16, 1935, served upon and receipt thereof acknowledged by the Solicitors of Record for the Bethlehem Steel Company, Seaboard Air Line Railway Company, Guaranty Trust Company of New York, and Merrel P. Callaway, as Trustees, The New York Trust Company and Mortimer N. Buckner, as Trustees, and The Continental Trust Company, as Trustee. In the interest of brevity said notices and receipts are not printed.

429

Application No. 146

In the District Court of the United States for the
Eastern District of Virginia

Consolidated Cause. In Equity No. 214

GUARANTY TRUST COMPANY OF NEW YORK AND MERREL P.
CALLOWAY, AS TRUSTEES, ET AL., *complainants*

against

SEABOARD AIR LINE RAILWAY COMPANY, ET AL., *defendants*

And in the Constituent Causes Numbered 213, 214, 228, and 229
of Said Consolidated Cause

APPLICATION OF RECEIVERS FOR AUTHORITY (A) TO CARRY OUT THE
PROJECTS OF REPLACING, STRENGTHENING, OR OTHERWISE IMPROVING
CERTAIN STEEL BRIDGES ON THE RAILROAD OF DEFENDANT RAILWAY
COMPANY AND TO INCUR AND PAY THE COST THEREOF, AND (B) IN
RESPECT OF CERTAIN MISCELLANEOUS MATTERS

To the Honorable LUTHER B. WAY, *Judge of the District Court
of the United States for the Eastern District of Virginia:*

Leigh R. Powell, Jr., and Henry W. Anderson, the Receivers
herein, respectfully show:

I

As set forth in Section I of Application No. 5 of the Receivers
filed herein on January 27, 1931 (Printed Receivership Record,
pp. 640, et seq.), in order to safely, efficiently, and economically
manage and operate the railroads and properties in their charge,
to preserve and maintain the same and to properly serve the
public in the transaction of their business as a common carrier,
it is necessary for the Receivers to make and provide from time
to time repairs, renewals, replacements, improvements, and addi-
tions to said railroad and property, necessary for the normal

usual, and customary maintenance and operation thereof during the receivership. Order No. 5, entered on January 27, 1931, upon said Application No. 5, which in subsequent orders of this Court has been confirmed and continued in effect in this Consolidated Cause, provides that with respect to a particular work, project, or improvement, etc., of the character mentioned and included in said Section I in said Order No. 5 thereon, and where the estimated charge to capital account shall exceed \$6,000, the Receivers shall first make written application to the Court and obtain its authority therefor.

To provide for the safe and efficient use and operation of certain new heavy type locomotives proposed to be acquired by the Receivers, it will be necessary, in their judgment, to replace, strengthen, or otherwise improve the steel bridges hereinafter mentioned. Subject to the approval and authorization of the

Court, the Receivers have included these projects in their
430 Additions and Betterments Program—Budget Item No. 4.

Steel Bridges—for the current year. These projects are of the character mentioned and included in Section I of said Application No. 5 and in said order thereon and are as follows:

Budget Item No. 4.—Steel Bridges:

AFF No. LR-4759 (1 project). Location: James River, Richmond, Va. Removal of three existing truss spans over north channel of James River and four existing truss spans over south channel, and removal of existing 350 feet of viaduct on Mayo's Island in the river and 100 feet of existing viaduct at south end of bridge, and replacing with deck girder spans, with necessary additional foundations. The present bridge, above described, consists partly of pin connected through truss spans each 153 feet long and 450 feet of girder viaduct, all built in 1899, and designed for locomotives weighing $78\frac{1}{2}$ tons with axle load of 35,000 pounds. This structure has heretofore been strengthened and for many years has been carrying locomotives weighing up to 160 tons with axle load of 55,000 pounds.

Estimated gross cost of project.....	\$166,300
Estimated net charge to capital account.....	96,700

AFF No. LR-4760 (1 project). Location: Richmond, Va. Strengthening of steel viaduct between James River Bridge and Main Street Station. This steel viaduct is about 3,000 feet long and is continuous with James River Bridge. It was built in 1899 and designed for engines weighing $78\frac{1}{2}$ tons with axle load of 35,000 pounds. This viaduct with some strengthening has been for many years carrying engines weighing up to 160 tons with axle load of 55,000 pounds, and a considerable part of it is capable of continuing this loading; however, there are many connec-

tions and much of the bracing that require strengthening, and it is proposed at this time to strengthen all parts now known to require it. It may later become necessary to further strengthen the remainder of the structure, and when the need therefor arises the Receivers will submit appropriate recommendations to the Court.

Estimated gross cost of present project.....	\$25,000
Estimated net charge to capital account.....	6,000

AFF No. LR-4762 (1 project). Location: Kilby and Suffolk, Va. Increasing clearances under overhead crossings of Norfolk & Western Railway, Kilby, Va., and Southern Railway and Atlantic Coast Line Railroad, near Suffolk, Va. The existing clearances at these crossing are restricted and do not accommodate a number of locomotives now operated on the Seaboard Air Line Railway, and in order to improve the vertical clearances and make it possible to pass all locomotives now owned, and the heavier type locomotives proposed to be acquired, safely under these overhead structures to reach Portsmouth Shops it is necessary to increase these vertical clearances up to 17 feet each. The present clearances are—Norfolk & Western, Kilby, 15 ft. 11 in.; Southern Railway, Suffolk, 16 ft. 3½ in.; Atlantic Coast Line, Suffolk, 16 ft. 1 in.

431 The total estimated cost of this work is \$12,670, based on lowering the Seaboard Air Line tracks sufficiently at each location to provided vertical clearance of 17 feet.

Estimated gross cost of project.....	\$12,670
Estimated net charge to capital account.....	8,672

In the opinion of the Receivers the above-stated projects under AFEs Nos. LR-4759, LR-4760, and LR-4762 are necessary in the safe, proper, efficient, and economical preservation, management, maintenance, and operation of the railroads and properties in their possession and control. The Receivers therefore recommend that they be authorized to carry out and perform these projects and pay in each case the necessary cost thereof out of funds now or hereafter in their possession as Receivers, including the part of such cost chargeable to capital account and estimated for all of the projects as set forth under the above-stated Budget Item No. 4, to be \$111,972 in the aggregate so chargeable.

II

Air-conditioning certain additional cars owned by defendant
Railway Company

Pursuant to the authority contained in Order No. 128 (Printed Receivership Record, pp. 6474, et seq.), entered herein on Decem-

ber 19, 1933, and to Order No. 132 (Printed Receivership Record, pp. 6593, et seq.), entered herein on January 30, 1934, the Receivers have carried out and performed, on the basis authorized by said orders, the project of air-conditioning certain cars owned by defendant Railway Company.

After further careful study by the Receivers, and for the reasons stated in their Application No. 128, referred to in their Application No. 132, upon which said Orders Nos. 128 and 132 were, respectively, granted, the Receivers deem it to be in the interest of the receivership estate that they should also be authorized to obtain the air-conditioning of three more dining cars owned by defendant Railway Company, in order primarily to provide the full complement of equipment for the two important through trains of the Receivers known as the Orange Blossom Special and the Southern States Special during the coming passenger travel season. The Receivers propose to also use this additional air-conditioned equipment, when not required for these trains, in their other important passenger trains to and from points in Florida and such other points on the railroad of defendant Railway Company as the Receivers shall from time to time determine and as traffic conditions or circumstances shall in their judgment require.

The Receivers propose to arrange for air-conditioning as herein proposed the 3 dining cars owned by defendant Railway Company as shown in Section II of the schedule attached as Exhibit A to said Application No. 132, by installation of modern and approved air-conditioning equipment of the type manufactured by the Pullman Car and Manufacturing Corporation or some other manufacturer. The estimated cost per car of so equipping the three additional cars complete and ready for service, including

any changes in the cars necessary to accommodate the air-conditioning equipment, is the same as shown on Section II of said Exhibit A. The cars owned by defendant Railway Company herein proposed to be air-conditioned are subject to Equipment Trusts "Y" and/or "Z" of the Railway Company. A schedule of such trusts and of the equipment to be selected is shown on Exhibit B, attached as a part of said Application No. 132.

Accordingly, the Receivers recommend that they be authorized by the Court:

1. To carry out and perform the project of air-conditioning the three dining cars owned by defendant Railway Company upon the basis and under the terms as above set forth, and to enter into such agreement or agreements with the Pullman Car and Manufacturing Corporation, or other manufacturer, as the Receivers may deem appropriate.

2. To make agreements as may be possible with other railroads concerning the use of such equipment on such lines of railroad and concerning the proportion, if any, of the cost of air-conditioning or rental of such equipment to be borne by such railroads, or any of them.

3. If the order of the Court upon this section of this application shall authorize the Receivers to carry out and perform the above-stated air-conditioning project, the Receivers recommend that said order declare and provide (i) that the Receivership of defendant Railway Company shall not be terminated nor the receivership estate thereunder surrendered by the Receivers, or their successor or successors, unless as a condition of such termination or surrender, all of the unperformed obligations of the Receivers then existing or to accrue, including all payment by the Receivers then due or thereafter to become due, incurred in the carrying out of such project, shall be assumed by defendant Railway Company or other corporation that shall succeed the Receivers in the possession of substantially all of the lines of railroad comprised in the receivership estate; (ii) that in case of any sale or conveyance of substantially all of said lines of railroad the purchaser, or transferee of the purchaser, shall not be at liberty either to refuse or accept the performance of said obligations, but if acquiring substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose of reorganization, any such purchaser shall not incur any personal liability on or in respect of said obligations, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume said obligations; and (iii) that in case any corporation, prior to the maturity and payment of all of said obligations, shall succeed the Receivers in the possession and control of substantially all of said lines of railroad (whether defendant Railway Company or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all of said obligations of the Receivers, the Receivers shall thereupon be relieved from all further liability or in respect of said obligations.

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III

Purchase and repair and/or reconditioning by the Receivers of
 ' ten second-hand locomotives

Subject to the approval of the Court, the Receivers have agreed to purchase from the owner ten Decapod type engines, built in 1917-19, at the price of \$5,600 per locomotive, or a total of \$56,000, to be paid in cash by the Receivers. The locomotives are

to be sold to the Receivers f. o. b. tracks in their possession and control at Richmond or Petersburg, Va., and subject to preliminary inspection at their present point of location at Detroit, Michigan, and Jackson, Ohio, and to final inspection and acceptance at the points of sale and delivery to the Receivers by a representative of the Receivers. The locomotives are to be purchased by the Receivers free of all liens or charges and by bill of sale in form approved by Counsel for the Receivers.

The Receivers propose, after delivery of the locomotives to them, to so repair or recondition same as to put them in condition for satisfactory service on the railroads in the possession and control of the Receivers. The estimated cost to the Receivers of this work is \$7,000 per locomotive. With this cost added to the purchase price, the total estimated cost to the Receivers of the locomotives will be \$126,000.

The acquisition and use of these locomotives by the Receivers will avoid the necessity for certain heavy and expensive repairs to and permit the retirement of certain existing lighter type locomotives owned by defendant Railway Company. In the judgment of the Receivers, the use by them of these ten locomotives in the first year and annually thereafter during their service life, which is estimated at not less than 10 years, will effect very substantial savings in operating and maintenance expenses of the Receivers, will more than justify the cost of acquisition and the repair and or reconditioning of the ten locomotives and materially benefit the receivership estate.

Accordingly, the Receivers recommend that their action in agreeing to purchase the ten second-hand locomotives, at the price and upon the other terms above stated, be authorized, ratified and approved by the Court, and that they be authorized to repair and or recondition the locomotives as above set forth, to pay the said purchase price thereof and the cost of such repairs and or reconditioning, out of funds now or hereafter in their hands as Receivers, and estimated to amount in the aggregate to \$126,000, all chargeable to capital account, the locomotives, as and when purchased by the Receivers, to be and remain assets of the receivership estate of defendant Railway Company.

IV

Issue of certain First and Consolidated Mortgage Bonds in lieu of lost bonds.

The owner or holder of nine Seaboard Air Line Railway Company First and Consolidated Mortgage Bonds, Series A, numbered M-4244, 12442, 24868, 55824, 71897, 72479, 82881, 82882, and

82883, for \$1,000 each, has advised the Receivers said bonds, with March 1, 1931, and subsequent interest coupons
 434 attached, have been lost, and has applied for the issue of new bonds of like tenor and effect and bearing the same serial numbers. Section 8 of Article One of the First and Consolidated Mortgage of defendant Railway Company, dated September 1, 1915, to Guaranty Trust Company of New York and Merrel P. Callaway (present individual Trustee thereunder), as Trustees, Complainants in this Consolidated Cause, provides for the issue in the discretion of defendant Railway Company and authentication and delivery by the Corporate Trustee thereunder in lieu of lost, destroyed or mutilated bonds or coupons thereunto appertaining, issued under said Mortgage, of new bonds or coupons of like tenor and date and bearing the same serial numbers. Said Section 8 requires the applicant for such substituted bonds or coupons to furnish the Railway Company and the Corporate Trustee satisfactory evidence of such loss, destruction and mutilation and indemnity satisfactory to both the Railway Company and such Trustee.

Paragraph 2 of the original order appointing the Receivers, entered December 23, 1930 (Printed Receivership Record, p. 48), authorizes and directs the Receivers, among other things, to manage and conduct the business of defendant Railway Company and to exercise its authority and franchises. Under Paragraph 5 of said order (Printed Receivership Record, p. 54) the Receivers are authorized to pay, in addition to other expenses therein mentioned, the cost of maintaining the corporate existence of defendant Railway Company and the necessary expense of the registration and transfer of its stocks and bonds.

Counsel for the Receivers are of the opinion that the authority granted the Receivers by these paragraphs of the order, which by subsequent orders of this Court have been confirmed and continued in effect in this Consolidated Cause, are probably sufficient to authorize the issue by defendant Railway Company, in its discretion, with the approval of the Receivers, of the bonds applied for in this case, in lieu of or substitution for such lost bonds, upon compliance by the applicant with the above-stated provisions of said Section 8 of the Mortgage. However, the Receivers, with the advice of their Counsel, in order to avoid any question as to such authority, recommend that the Court authorize defendant Railway Company, with the approval of the Receivers first obtained, to issue and, when authenticated by the Corporate Trustee under said Mortgage, to deliver or cause to be delivered, in lieu of or substitution for said lost bonds and coupons, new bonds and coupons of like tenor and effect, of the

same date and bearing the same serial numbers, provided the applicant shall first furnish evidence of the loss of said nine bonds and coupons, and indemnity, satisfactory to defendant Railway Company, the Corporate Trustee under said Mortgage and to the Receivers.

V

Lease by the Receivers of certain coal lands

To insure adequate coal supply and to effect necessary economies in the cost of coal to the receivership estate, the Receivers have in two instances, subject to the approval of the 435 Court, leased directly from the Landowners the right to take from the land a specified minimum and maximum tonnage of coal for use by the Receivers, upon payment by the Receivers to the Landowners of rent or royalties at the rate per ton customarily charged by such Landowners in their lease of such rights. The leases in each case are in the form and contain terms and provisions satisfactory to the Receivers and approved by their Counsel. One of the leases is for a period of fourteen months, beginning on May 1, 1934, and the other for a period of one year, beginning on July 17, 1934. Each lease provides for renewal thereof at the option of the Receivers from year to year for four additional successive years. The Receivers have, in connection with each of these transactions, contracted with an independent contractor under agreements containing terms and provisions satisfactory to the Receivers and approved by their Counsel, for the service and work of mining, producing and loading the coal on railroad cars at the mine for shipment to the Receivers. Each of such agreements with the independent contractor are for a period coextensive with the term of the lease, or extensions or renewals therein provided for, from the respective Landowners.

The Receivers recommend:

(1) That their action in entering into said leases and said agreements with the independent contractors be authorized, ratified and approved by the Court.

(2) That if the order of the Court upon this section of this application shall authorize, ratify and approve said action by the Receivers, said order contain, and as relating and applicable to the unperformed obligations, accrued or to accrue, of the Receivers, including payments due or to become due by them, under and by virtue of each of said leases and agreements, the same declarations and provisions as the Receivers in and by paragraph 3 of Section II of this application recommend be declared and provided as referable and applicable to the subject matter of said

paragraph 3 in the order of the Court upon Section II of this application.

VI

Participation by Receivers in Expense Incident to Construction of Overhead Bridge at Cox Road, Petersburg, Va.

By Section I of Order No. 134 of the Court (Printed Receivership Record, p. 6620) the Receivers as recommended in Section I of their Application No. 134 (Printed Receivership Record, p. 6607), were authorized to participate to the extent of not exceeding \$1,675— all chargeable to capital account, in the expense incident to construction of the overhead bridge spanning the tracks of defendant Railway Company at Cox Road, Petersburg, Virginia. As stated in Section I of said application, the existing grade crossing is dangerous and its elimination will be of material benefit to the receivership estate. As further stated therein, the cost of the structure, except the expense of securing rights-of-way and/or of damage claims, will be paid out of funds allocated to the State of Virginia pursuant to the provisions of the National Industrial Recovery Act, and the Rules and Regulations governing expenditure of such funds on projects of this character require that the expense of right of way and of damage claims be paid by other interested parties. Since said Order No. 134 was entered, changes have occurred in the plans of the structure, requiring the purchase of additional rights of way, and it will be necessary, in order to secure the benefits expected to accrue to the receivership estate from the construction of the bridge, for the Receivers to increase their participation in the cost of the project to not exceeding \$3,000.00.

Accordingly, the Receivers recommend that the Court in its order upon this section of this application modify and amend Section I of said Order No. 134 so as to authorize the Receivers in their discretion to participate in the expense incident to the construction of this overhead bridge to the extent of not exceeding \$3,000.00, all chargeable to capital account.

VII

Participation by Receivers in Expense of Construction of Underpass at Hamlet, N. C.

For some time representatives of the Receivers have been negotiating with the State Highway Department of North Carolina in the matter of construction of an underpass beneath the tracks of defendant Railway Company at Hamlet, N. C., and

which, if provided, will eliminate through travel on Hamlet Avenue, located just north of the passenger station of defendant Railway Company and over which avenue a large amount of switching of passenger trains is done. As proposed, all of the cost of this project, except for necessary rights of way, will be paid by the State Highway Commission out of Public Works Administration funds allocated to the State of North Carolina. It is proposed to locate the underpass on privately owned property, which will necessitate the purchase of a considerable amount of right of way therefor. The Rules and Regulations governing the expenditure of Public Works Administration funds require that the expense of this right of way be borne by other interested parties. Elimination of the present through travel across the right of way and tracks of defendant Railway Company at Hamlet Avenue, which it is expected would result from the construction of this underpass, will, in the lessened hazard of accidents, materially benefit the receivership estate of defendant Railway Company. The Receivers recommend that they be authorized, in their discretion, to participate to the extent of not exceeding over \$3,500, in the cost of the above-mentioned rights of way necessary to be acquired, if and when the underpass is constructed, and to pay not exceeding that amount, all chargeable to capital account, out of funds in their hands as Receivers, in the carrying out of the project.

VIII

Repair and Improvement of Nassau River Bridge, Near Yulee, Florida

The bridge of defendant Railway Company over the Nassau River, Mile Post 615.3, near Yulee, Florida, consists of 458
437 feet of open deck trestle on the south end and 167 feet of open deck trestle on the north end, connected by a 45-foot through steel girder span. This span was built in 1912 to replace a lighter span, is of modern construction and is designed to carry the heaviest engines now used by the Receivers. The steel span is supported on pile foundation in very deep water. Marine borers have attacked the piling and about one-half of the piles, or an aggregate of about 30% of the cross section, have been destroyed by these borers. To repair this damage it is necessary, in the opinion of the engineers of the Receivers, that the present piling be encased in two concrete piers at an estimated cost of \$14,500. In the judgment of the Receivers the necessity for this work is urgent and they recommend that they be authorized to carry out and perform the project and to pay the cost thereof, including

the portion, estimated at \$11,953, chargeable to capital account, out of funds in their hands as Receivers.

IX

Selection by Receivers of Union Trust Company, St. Petersburg, Florida, as an Additional Depositary for Moneys coming into their hands as Receivers

Pursuant to paragraph (4) of the original order appointing the Receivers, which has in subsequent orders of this Court been confirmed and continued in effect in this Consolidated Cause, the Receivers state they have selected Union Trust Company, St. Petersburg, Florida, as an additional depositary for funds in the Receivers' hands. The Receivers request that the Court approve and confirm said selection.

Wherefore, the Receivers pray for the authority and instructions of the Court in the premises.

LEGH R. POWELL, JR.,

HENRY W. ANDERSON,

Receivers.

Dated at Norfolk, Virginia, July 27, 1934.

Approved:

TAZEWELL TAYLOR,

W. R. C. COCKE,

HAROLD J. GALLAGHER,

Counsel for Receivers.

STATE OF VIRGINIA,

City of Norfolk, ss:

Legh R. Powell, Jr., and Henry W. Anderson, being duly sworn, depose and say that they are the Receivers named in the foregoing application and that they have read the foregoing application and know the contents thereof, and that the same are true to the best of their knowledge and belief.

LEGH R. POWELL, JR.,

HENRY W. ANDERSON,

Receivers.

Subscribed and sworn to before me this 27th day of July, 1934.

[NOTARIAL SEAL]

M. E. CARROLL,

Notary Public.

My Commission Expires March 4, 1936.

Filed July 31, 1934. C. P. Breese, Jr., Deputy Clerk.

In the District Court of the United States for the Eastern
District of Virginia

Consolidated Cause. In Equity. No. 214

GUARANTY TRUST COMPANY OF NEW YORK AND MERREL P. CALLA-
WAY, AS TRUSTEES, ET AL., COMPLAINANTS

against

SEABOARD AIR LINE RAILWAY COMPANY ET AL., DEFENDANTS

And in the Constituent Causes Numbered 213, 214, 228, and 229
of Said Consolidated Cause

ORDER AUTHORIZING THE RECEIVERS (A) TO CARRY OUT THE PROJECTS
OF REPLACING, STRENGTHENING, OR OTHERWISE IMPROVING CERTAIN
STEEL BRIDGES ON THE RAILROAD OF DEFENDANT RAILWAY COMPANY
AND TO INCUR AND PAY THE COST THEREOF, AND (B) IN RESPECT
OF CERTAIN MISCELLANEOUS MATTERS

The Application No. 146 of Leigh R. Powell, Jr., and Henry W. Anderson, the Receivers herein, for the authorization and approval of the Court (a) of the projects set forth in Section I of the application this day filed, and (b) in respect of certain miscellaneous matters as set forth in Sections II to IX, inclusive, of the application, coming on for hearing and it appearing that notice of the time and place of presentation of said application and the order to be entered thereon has been duly served upon the Solicitors of Record for all the parties to this Cause, no objection having been *been* made and Counsel having been heard, and it appearing that the said projects as set forth in said Sections I and VIII are necessary in the repair, renewal, replacement and in the improvement and betterment of the railroad and properties in the possession and control of the Receivers, for the safe, efficient, and economical management and operation of said railroad and properties, and to preserve and maintain the same, and to properly serve the public in the performance of the Receivers' duties as a common carrier, and it further appearing that the recommendations made by the Receivers in Sections I to IX, inclusive, of said applications are in the interest of the receivership estate, it is accordingly

Ordered, adjudged, and decreed, as follows:

I

That the action of the Receivers in approving the work and projects as set forth in Section I of the application, under ARRs Nos. LR-3759, LR-4760, and LR-4762, under Budget Item No. 4, at an estimated charge to capital account in the case of each of said projects of the amount included and set forth in said items, respectively, and at an estimated net charge to capital account for all of said items of \$111,972, and the expenditure by the Receivers of the aforesaid amounts, be, and the same are hereby, in all respects, authorized and approved.

II

That the Receivers are authorized:

(a) To carry out and perform the project of air-conditioning the three cars, as referred to in Section II of the application, owned by the Railway Company, and to pay the cost and expense thereof, and to enter into such agreement or agreements with the Pullman Car and Manufacturing Corporation or other manufacturer as the Receivers may deem appropriate and in the interest of the receivership estate.

(b) To make such agreement with other railroads as the Receivers deem appropriate and in the interest of the receivership estate, concerning the use of any of said cars upon the lines of such railroads and concerning the proportion, if any, of the cost and/or rental of air-conditioning such cars to be borne by such railroads, or any of them. The authority to the Receivers to carry out and perform the project of air-conditioning the cars shall not, however, be conditioned or contingent upon the ability of the Receivers to obtain the participation of other railroads in such cost and/or rental.

(c) The Receivers are further authorized to carry out and perform all the covenants and obligations contained in all or any of the agreements which the Receivers, by this order, are authorized to make and enter into and on the part of the Receivers to be carried out and performed.

(d) The Receivership herein shall not be terminated, nor the receivership estate thereunder surrendered by the Receivers herein, or their successor or successors, unless as a condition of such termination or surrender all of the unperformed obligations of the Receivers then existing or to accrue under or by virtue of all or any of the agreements which the Receivers are by this Section II of this order authorized to make and enter into, in-

cluding all payments by the Receivers then due or thereafter to become due thereunder, shall be assumed by defendant Railway Company or other corporation that shall succeed the Receivers in possession of substantially all the lines of railroad comprised in the receivership estate. In case of any sale or conveyance of substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose of reorganization, any such purchaser shall not incur any personal liability on or in respect of said obligations, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume said obligations, including all payments by the Receivers then due and unpaid, or thereafter to accrue, under or by virtue thereof. In case any corporation shall, prior to the maturity and payment of all of said obligations, succeed the Receivers in the possession and control of substantially all of said lines of
 440 railroad (whether defendant Railway Company or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all of said obligations of the Receivers, the Receivers shall thereupon be relieved from all further liability on or in respect of said obligations.

III

That the action of the Receivers in agreeing to purchase from the owner the ten (10) Decapod type locomotives, mentioned in Section III of the application, at the price and upon the terms therein set forth, be, and such action is hereby, in all respects, authorized, ratified, and approved.

The Receivers are further authorized, upon such sale and delivery to them of the locomotives, to pay out of funds now or hereafter coming into their hands as Receivers, the purchase price of the locomotives and the cost of the repair and/or reconditioning thereof, as referred to in the application, and estimated to amount in the aggregate to \$126,000, all chargeable to capital account. Said locomotives, as and when purchased by the Receivers, shall be and remain a part of the assets of the receivership estate of defendant Railway Company.

IV

The defendant Railway Company is authorized, with the approval of the Receivers first obtained, to issue and cause to be authenticated by the Corporate Trustee under the First and Consolidated Mortgage of Seaboard Air Line Railway Company, in

lien of or substitution for the nine (9) lost bonds mentioned in Section IV of the application, new bonds of like principal amount, date, tenor, and effect and bearing the same serial numbers; provided the applicant for the substituted bonds shall furnish evidence of the loss of the bonds and indemnity which is satisfactory to defendant Railway Company, to the Corporate Trustee under said Mortgage, and to the Receivers.

V

That the action of the Receivers in leasing from the respective Landowners the right to take coal from the land for the use of the Receivers and, in connection with each transaction, in contracting with an independent contractor for the service and work of mining, producing, and loading the coal on cars for shipment to or for account of the Receivers, as set forth in Section V of the application, be, and said action, in each case, is hereby authorized, ratified, and approved.

The receivership estate hereunder shall not be terminated, nor the receivership estate thereunder surrendered by the Receivers herein, or their successor or successors, unless as a condition of such termination or surrender all of the unperformed obligations of the Receivers then existing or to accrue under or by virtue of each of the leases and agreements referred to in this Section V of this order, including all payments by the Receivers then due or thereafter to become due thereunder, shall be assumed by de-

fendant Railway Company or other corporation that shall
441 succeed the Receivers in possession of substantially all the lines of railroad comprised in the receivership estate. In case of any sale or conveyance of substantially all of said lines of railroad for the purpose of transferring them to a corporation formed for the purpose or reorganization, any such purchaser shall not incur any personal liability on or in respect of such obligations, provided such corporation to which substantially all of said lines of railroad are so transferred in such reorganization shall assume said obligations, including all payments by the Receivers then due and unpaid, or thereafter to accrue, under or by virtue thereof. In case any corporation shall, prior to the maturity and payment of all of said obligations, succeed the Receivers in the possession and control of substantially all of said lines of railroad (whether defendant Railway Company or any corporation formed for the purpose of reorganization, or any other corporation), and shall assume all of said obligations of the Receivers, the Receivers shall thereupon be relieved from all further liability on or in respect of said obligations.

VI

That Section I of Order No. 134 of the Court, filed herein on February 7, 1934, is hereby so amended and modified as to authorize the Receivers, in their discretion, to participate in the expense incident to the construction of the overhead bridge at Cox Road, Petersburg, Va., by the payment out of funds in their hands as Receivers of not exceeding \$3,000.00—all chargeable to capital account.

VII

That the Receivers are authorized as recommended in Section VII of the application, in their discretion, to participate in the expense of purchasing rights of way necessary to be acquired in the construction of the proposed underpass at Hamlet, North Carolina, by the payment out of funds in their hands as Receivers of not exceeding \$3,500.00—all chargeable to capital account.

VIII

That the Receivers are authorized to carry out and perform the project of repairing and/or improving the Nassau River Bridge of defendant Railway Company, near Yulee, Florida, as set forth in Section VIII of the application, and to pay out of funds in their hands as Receivers the cost thereof, including the portion of such cost, estimated at \$11,953.00—chargeable to capital account.

IX

That the selection by the Receivers of Union Trust Company, St. Petersburg, Florida, as an additional depository for funds in the Receivers' hands, is hereby approved.

X

Nothing contained in this order shall, as between the holders of claims and demands against defendant Railway Company for which a preference or priority in the payment thereof is asserted and the Trustees of the mortgages secured by lien upon the properties of said Railway Company, be considered a determination as to whether or not the payments hereby authorized will constitute a diversion of income for the benefit of the mortgage security, such questions and all kindred

makes the following findings of fact and conclusions after due consideration of the evidence and testimony adduced at the hearing and the entire record in this proceeding, including the application, the briefs filed, the Examiner's report and exceptions thereto, and the oral argument.

Findings of fact

1. Applicants, Leigh R. Powell, Jr., and Henry W. Anderson, are the duly appointed (by order entered December 23, 1930, by the United States District Court of the Eastern District of Virginia) and acting Receivers of the Seaboard Air Line Railway Company (the "Railway Company"), a common carrier by rail operating under a consolidated charter granted by the States of Virginia, North Carolina, South Carolina, Georgia, and Florida and operating in the State of Alabama by virtue of a foreign corporation permit. During the years 1934 and 1935 Applicants, for and on account of the Railway Company, entered into certain hereinafter specified leases of coal lands in the States of West Virginia and Virginia and contracted for the production of coal from said leased premises.

William Ann Mine

2. (a) On May 1, 1934, the Applicants entered into a fourteen-month lease of approximately 4,000 acres of coal land of the Upper Thacker vein in Mingo County, West Virginia, known as the William Ann mine. The mine is owned by the United Thacker Coal Company and the Cole and Crane Trustees, a real-estate trust, lessors. The lease grants Applicants "the sole and exclusive right and privilege of extracting, mining, and removing coal for lessees' own use." The lessors agree therein, simultaneously with the delivery of the lease, to enter into a contract leasing, for a period coextensive with the term of the mine lease, the mining machinery, tipples, and equipment located on the leasehold to such person as Applicants might elect to retain as an independent contractor to operate the mine. Applicants agree to pay a royalty, as rent, of 9 cents per net ton of coal "mined and shipped from or used on said premises by the Lessees or by the Contractor for account of the Lessees," payable to the lessors on or before the 25th of the month succeeding that in which the coal was extracted. Sixty percent of the royalties are payable to United Thacker Coal Company and forty percent to the Cole and Crane Trustees. The lease further provides for payment by the lessees of a minimum annual royalty of \$16,200, reducible if lessees fail to mine coal through no fault of their own and on

certain other contingencies including cancellation of the lease before expiration of the year. In no event is the royalty to be less than \$10,000 for one year's rental. If royalty on coal actually mined in one month is below that which must be paid as minimum royalty, tonnage above the amount of minimum royalty in another month may be set off in the form of free tonnage proportionate to the excess previously paid.

The quantity of coal mined is to be determined by weights of the Norfolk & Western Railroad Company, or, if shipped other than on land, in a manner satisfactory to lessors and Applicants. Applicants agree to pay taxes and assessments on the realty. The lease further provides that Applicants may elect to terminate the lease upon the expiration of fifteen days' written notice in the event of termination of the contract of operation for breach or default in the terms thereof. The lease provides, upon appropriate written notice, for renewal or extension from year to year at the option of applicants, not to exceed four years from and after June 30, 1935, upon the same terms and conditions as found in the original lease. The one-year term with the renewal privilege is not usual in leases in the area, a much longer term being customary.

The term of the William Ann mine lease was extended for a period of three weeks in 1936, while the decision of the United States Supreme Court in *Carter v. Carter Coal Company*, 298 U. S. 238 (1936), which involved a challenge of the constitutionality of the Bituminous Coal Act of 1935, the predecessor of the present Coal Act, was pending; the extension was for the express purpose of awaiting the outcome of the case. A decision invalidating that Act was rendered on May 18, 1936. The Receivers anticipated a break in the coal market if the decision nullified the Act, and their consequent ability to purchase coal at prices below those being paid for coal from the leased tracts. Another extension, of less than three weeks, was effected in the summer of 1936, while the disposition of certain coal legislation by Congress was awaited. (Corresponding extensions of the contract to operate the William Ann mine, hereinafter discussed,

534 were made.) The yearly renewals of the lease, with certain amendments, modifications, and supplements, were also made by Applicants and it was in effect at the time of the hearing on this application. The provisions of the original lease contemplated operation only until June 30, 1939. However, it appears from statements made by Applicants' counsel in oral argument before the Director on September 12, 1939, that a renewal has been effected and the mine is being operated on the same terms and conditions as shown by the record.

(b) On May 1, 1934, Applicants consummated a contract with Daniel H. Pritchard for operation of the William Ann mine. The contract was made expressly subject to the execution of a lease between Applicants and the United Thacker Coal Company and Cole and Crane Trustees. By the contract, Pritchard agreed to acquire, at his sole expense, the privilege of using the mining machinery, tipples, and equipment located on the leasehold and necessary for the extracting of coal and loading the same into railroad cars for the Applicants' use. Coal so extracted and mined is to be loaded in quantities of not less than a specified number of net tons monthly. Provision was made for the cancellation of the contract, at Applicants' option, upon default on the part of the Contractor or a breach of the provisions thereof.

The material provisions of the contract under which Pritchard operates the mine are as follows:

"The Contractor is, at his sole expense, to perform all service and work of every sort, character, and description, and is to furnish or provide all the labor, materials, supplies, machinery, equipment, appliances, and facilities, necessary or convenient for, or in and about, the performance of all of the service or work of so extracting, mining, manufacturing, transporting, and loading said coal. The Contractor will, at his sole expense, provide and at all times during the continuance of this agreement maintain, manage, and conduct such organization as is necessary to the efficient and punctual performance by the Contractor of the service and work herein contracted for by him.

* * * * *

"The Contractor will assume and perform all obligations, liabilities, and duties of the Receivers to the Landowner which shall at any time accrue, exist, or arise under or by virtue of the agreement between the Receivers and the Landowner whereunder the Receivers will purchase or otherwise acquire the rights above mentioned (except the obligation of the Receivers under such agreement to pay to the Landowner the rental or royalty of 9c per ton and or the minimum royalty, if any, to be provided for in said agreement between the Receivers and the Landowner, and except taxes required under said agreement to be paid by the Receivers on the land and for which provision is hereinafter made), and the Contractor will at all times, and he does hereby (except as to said rental or royalty payments and said taxes), protect, indemnify, and save harmless the Receivers from and against, and or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise.

"The Receivers will pay all taxes, assessments, and levies assessed on or against the land acquired to be paid by them

thereon under said agreement between the Receivers and Landowner. The Contractor hereby assumes and will duly and punctually pay and discharge all taxes, assessments, and levies assessed on, against, or in respect of the improvements on said land and or all other property or rights acquired by the Contractor under or by virtue of his said agreement with the Landowner, and/or on, against, or in respect of all property or rights, if any (other than on said land) granted the Receivers under said agreement between the Receivers and the Landowner, including privilege, license, and other taxes, if any, imposed or assessed against the Receivers.

"The Contractor will, at his sole expense, take out and maintain in full force and effect at all times during the continuance of this agreement, employer's liability, casualty, and such other insurance as is customarily and under prudent and modern mining-company practice carried by mining companies, which is not carried for the benefit of the Landowner, in each case, in the aggregate amount, with such insurance company or companies and under such forms of policies, as shall be approved by the Receivers, to the end that such insurance will adequately and fully protect the respective interests of the Receivers and the Contractor. The loss, if any, under such insurance policies shall be made payable to the Contractor and/or the Receivers, as their respective interests may appear, and the Contractor will, upon request of the Receivers, promptly furnish the Receivers with appropriate certificate or certificates, by the insurers that such insurance has been so taken out by the Contractor and is maintained in force as in this section hereof provided.

"The Contractor will duly and punctually pay all cost and expense of every sort, character, or description necessary to, in, and about or incident or related to the service and work herein agreed to be performed by the Contractor, and the Contractor expressly assumes all risk of, agrees to at all times, and does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of, accidents, casualties, and all other risks incident to or in respect of the service and work herein contracted for.

535 "The Contractor further assumes all responsibility for and will at all times, and he does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of:

"(a) All loss and expense incident to injury, fatal or otherwise, to persons, and or damage to property, arising or growing in any manner, directly or indirectly, out of or in connection with (i) the service, work, or any other matter or thing contemplated

under this agreement to be carried out, done, or performed by the Contractor; and/or (ii) entry by the Contractor, his agents, servants, employees, or representatives, or other persons, in said mine and/or his or their presence in, on, or in the vicinity of, and/or use, working or occupancy of, said mine or premises, and/or the buildings, tipples, structures, equipment, machinery, appliances, and appurtenances, now or hereafter located in or on or near said mine or premises.

"(b) Subject to the provisions of Section 4 of this agreement, all taxes, assessments, and levies imposed by any Governmental authority or body on or in respect of said mine or premises, buildings, structures, equipment, machinery, appliances, and appurtenances, and/or on or in respect of the rights or privileges of either the Contractor or of the Receivers therein or with respect thereto, and/or the revenues, issues, or profits thereof.

"(c) All fines, penalties, and other loss which may result from the actual or alleged violation by the Contractor, his agents, servants, or employees, of any law, ordinance, or regulation of any public authority or body, and all liens, claims, of other liability for or on account of work, labor, materials, or supplies for the service and work contemplated under this agreement.

"(d) The terms 'expense' and 'loss' as used in this section are intended and shall be construed to include attorneys' fees and costs, as well as all other expenses."

In payment for Pritchard's services Applicants agreed to pay a flat sum of \$1,355 per ton of coal mined by Pritchard and delivered to the Receivers; the sum, however, was made adjustable upon the variation of certain specified cost elements. The contract provides an alternate basis of payment after November 1, 1934, at the option of Applicants, of actual per ton cost of production to the Contractor plus 10 cents per ton compensation. The Receivers have not availed themselves of the option. By the terms of the contract the relationship of Pritchard to Applicants is stated to be that of independent contractor.

Pritchard leases the William Ann mine production facilities and equipment from the United Thacker Coal Company and pays, as rent, 2 cents per ton for all coal produced.

The contract contains renewal and extension provisions similar to those contained in the mine lease and has been extended for periods exactly corresponding to those of the lease extensions, with amendments, modifications, and supplements thereto with regard to minimum and maximum tonnage, rate of compensation of the Contractor, and certain other provisions. The provisions of the contract contemplated operation only until June 30, 1939, but, as hereinbefore noted with respect to the William Ann

lease, it appears from the oral argument of Applicants' counsel that a renewal has been made.

(c) Under the N. R. A. code the price of coal produced at the William Ann mine was fixed at \$1.60 per ton. The price which Applicants agreed to pay Pritchard for operation of the mine plus the amount payable to the lessors as royalties under the original agreements totalled less than the aforesaid code price. One of the purposes of Applicants in entering into the arrangements was to enable them to purchase coal at a price below that which they would be required to pay under the code.

(d) Pritchard originally approached the United Thacker Coal Company with the plan of leasing and operating the William Ann mine for himself, and concurrently with the lease to the Receivers of the mine, the lessors, United Thacker Coal Company and the Cole and Crane Trustees, entered into a lease of the identical property with Pritchard, to begin immediately upon the termination, by expiration or otherwise, of the lease to the Receivers. The lease to Pritchard is for a term of 30 years, which is the customary term of mine leases in the vicinity, renewable for 30 years or until the coal is exhausted if before the expiration of 60 years, and is dated the same day as the lease to the Receivers.

Prior to the lease of the William Ann mine to Applicants, Pritchard owned stock in it and sold some of its production as Agent. The mine was then being operated by his brother.

Glamorgan Mine

3. (a) On July 12, 1934, Applicants entered into a lease with the Glamorgan Coal Lands Corporation of 6,000 acres of coal land, known as the Glamorgan mine, in Wise County, Virginia. The lease contains substantially the same language and material provisions, except as to quantities, prices, dates, and termination, as the William Ann mine lease. It is drawn in terms of 536 the grant of a mining privilege. The original lease was taken for one year beginning July 17, 1934, renewable at the option of Applicants from year to year, not to exceed an aggregate of four successive years after expiration of the original instrument. Said lease is terminable upon termination of the contract for operation for default or breach of the terms thereof. Royalty is fixed at 10 cents per ton for coal mined, reducible to 8 cents in the event payment to the Contractor hired to operate the mine exceeds \$1.32 per ton, the minimum being \$1,000 or \$800 per month, depending upon the current amount of per ton royalty. If the minimum royalty payable in one month exceeds

that for actual tonnage mined, actual tonnage mined in excess of minimum royalties in another month may be set off in the form of free tonnage proportionate to the excess previously paid.

Upon termination of the contract for operation of the Glamorgan mine and the resultant termination of the lease, the obligation of Applicants to pay royalty other than that accrued ceases.

The lessees and contractor are absolved from liability to the surface owner for damage done in mining. The surface is not included in the lease, but a right of transportation over it is given.

(b) On July 10, 1934, Applicants entered into a written contract, expressly subject to the consummation of a lease to them of the Glamorgan mine, with Glamorgan Coals, Inc., a Virginia corporation, for the operation of the mine by the latter as an independent contractor. Glamorgan Coals owned the mining machinery, tipples, and equipment located at the mine. The contract provided that Glamorgan Coals would furnish the equipment and all work and services necessary for producing coal from the mine and loading such coal into railroad cars for shipment by or on account of Applicants. In substance, and particularly with respect to the assumption of liabilities and functions to be performed by the Contractor, the contract contains provisions similar to those found in the contract with Pritchard for operation of the William Ann mine. It differs respecting amounts of production, price, dates, and certain other provisions. The contract provides that all coal found after shipment to be of inferior quality shall be removed by the Contractor free of expense to the Applicants. The contractor agrees to pay taxes and assessments on the improvements. Glamorgan Coals accepted the Code.

The contract as originally executed provided for a flat sum per ton payment of \$1.55 per ton to the Contractor, that amount including actual cost of operation plus 10 cents. Payment is made for coal mined, produced, and loaded, which conforms to specifications, and passes Applicant's inspection. The flat sum per ton payment under the last extension taken, to July 17, 1938, is \$1.82. The sum is adjustable in accordance with variation of certain specified cost elements.

(c) Pursuant to decree of the Wise County, Virginia, Circuit Court, dated August 31, 1937, the contract for operation of the Glamorgan mine was acquired by Peerless Coal Corporation, a Virginia corporation, from the Receivers of Glamorgan Coals, Inc. Peerless agreed to carry out all provisions of the contract as then existing and to give bond for performance. Subsequent

thereto Peerless has operated the mine in accordance with the terms of the contract.

Glamorgan Coal Lands, creditor of Glamorgan Coals and lessor of the mine to Applicants, foreclosed its lien against Glamorgan Coals at the time of the latter's receivership, and at foreclosure sale bid in certain surface rights, and the machinery, tipples, and equipment of Glamorgan Coals. Glamorgan Coal Lands is selling said facilities to Peerless for \$33,000 under a conditional sale arrangement, payment being made at the rate of 4½ cents per ton of coal mined.

The real-estate taxes on the Glamorgan mine are paid by the lessors, and all other taxes are paid by Peerless, including the excise and assessments due under the Act. Glamorgan Coals, Inc., was a Code Member; and the officials of Peerless assumed that Peerless became a Code member by virtue of succession to the contract of Glamorgan Coals, Inc., and as a consequence Peerless has not accepted the Code.

(d) The foregoing lease and contract have been supplemented, modified, and amended at various times and renewed as so supplemented, modified, and amended, and were in effect at the time of the hearing of the application herein, having been extended and renewed under the last renewal and extension thereof shown by the record for a period of three years from and after July 17, 1935, upon the same terms and conditions as the original lease and contract, except as supplemented, modified, or amended. The original instruments contemplated operation only until July 17, 1939. However, it appears from statements made by counsel for Applicants in oral argument before the Director on September 12, 1939, that renewals have been effected and the mine is being operated upon the same terms and conditions as shown by the record.

(e) Walter C. Shunk, President and sole stockholder of Peerless Coal Company, personally manages a commercial mine, the Puritan Coal Company, in West Virginia.

Chilton Block No. 1 Mine

4. (a) On July 5, 1935, the Chilton Block Coal Company, lessee from the Dingess-Rum Coal Company of a tract of coal land in Logan County, West Virginia, known as the Chilton Block No. 1 mine, offered to grant to Applicants the right and privilege of extraction of coal from said mine. The offer
537 was subject to the acceptance by Applicants of the offer of Daniel H. Pritchard of April 5, 1935, to extract, mine, manufacture, transport, and load coal from the mine on cars of Applicants for Applicants, and the offer of the mining privilege

was for a period, or an extension or renewal thereof, coextensive with that stated in Pritchard's offer. (The terms and conditions of the offer from Pritchard are hereinafter specified.) The Chilton Block Coal Company offer further agreed to grant to Pritchard, simultaneously, and for a period coextensive with a grant to the Applicants, the right to employ and use, in the performance of his work, the mining machinery, tipples, and other equipment necessary and convenient for the performance of such work and services by Pritchard. This offer further provided for the payment by the Applicants, in the event of its acceptance, of a rent or royalty of 10 cents per net ton for the coal mined and transported under and by virtue of the terms of the Pritchard contract. It contained an offer to execute and deliver to the Applicants an "appropriate instrument of conveyance, assignment, and transfer * * * of the right and privilege" to mine and remove the coal as provided by the Pritchard contract. The instrument was to contain, so far as applicable, the same terms, provisions, and conditions as contained in the lease to Applicants of the William Ann mine, dated May 1, 1934, except that the Applicants were not to pay any taxes, levies, or assessments against the lands comprising the mine properties. It provided that where the terms, provisions, and conditions of the William Ann mine lease were inconsistent with the terms and provisions of the offer, the offer should govern and control. The offer further contained a provision that the contemplated instrument of conveyance, assignment, and transfer should provide for a termination thereof by the Applicants simultaneously with the Applicants' termination of their agreement with Pritchard for the operation of the mine. The offer agreed to cause to be executed and delivered to the Applicants the written consent and agreement of the owners and lessors (The Dingess-Rum Coal Company) of the mine property involved, to the assignment and to the payment by the Applicants to the Chilton Block Coal Company of the rent or royalty.

The offer was accepted by Applicants on July 9, 1935, subject to court approval or ratification, and on July 15, 1935, the Dingess-Rum Coal Company agreed to the execution and delivery of the assignment as mentioned in the offer of the Chilton Block Coal Company. Court approval was subsequently obtained by the Receivers.

(b) On July 5, 1935, Daniel H. Pritchard offered to enter into a mining contract, as independent contractor, with the Applicants, subject to the acquisition by The Applicants through assignment or transfer of lease or other instrument, of the right to mine and remove coal from the property known as the Chilton Block No. 1 mine. He offered, at his sole expense, to mine coal and

to load the same on railway cars for shipment according to the specifications of the Applicants, for a flat sum of \$1.15 per net ton, subject, however, to upward or downward price adjustment dependent upon fluctuation in wages or unit prices over which he exercised no control. He further offered Applicants the right, after March 1, 1936, to adopt the alternate payment method of cost plus 10 cents per ton. The offer provided that Pritchard would purchase or otherwise acquire the mining machinery, tipples, and equipment necessary for the mining and loading of the coal located on the property known as the Chilton Block No. 1 mine, and contemplated the execution of a formal agreement upon acceptance of this offer by the Applicants, such agreement to embody substantially the same principal terms and conditions, with certain exceptions, as provided by the contract dated May 1, 1934, between Pritchard and the Applicants with relation to the operation of the William Ann mine.

This offer was accepted by the Applicants on July 9, 1935.

(c) The Chilton Block Coal Company failed to execute and to deliver the "appropriate instrument of conveyance, assignment, and transfer" as contemplated by the original offer of the Chilton Block Coal Company to the Applicants, but the contemplated instrument was to extend over a period of one year only, with option to extend and renew for further periods of one year, and the Applicants, under the accepted offer dated July 5, 1935, caused to be begun the process of mining the coal from the premises described in the offer, and caused Pritchard to remove coal from the premises and load the same into railroad cars at the mine for the Applicants' use. This was done with the written consent of the Dingess-Rum Coal Company. The arrangement has been continuously in effect through renewal and extension agreements as modified, supplemented, and amended, and was in effect at the time of the hearing on this application. The last extension shown by the record was to September 1, 1938, with right of Applicants to renew from year to year thereafter, not to exceed an aggregate of two years.

(d) By letter-offer of June 30, 1936, the Applicants offered to extend and renew the agreement by which Pritchard agreed to operate the Chilton Block No. 1 mine from June 30, 1936, to August 31, 1937, and the offer further provided for renewal from year to year, not to exceed an aggregate period of three years from and after August 31, 1937, upon the designated written notice. The offer made certain supplements, modifications, and amendments to the original agreement between the Applicants and Pritchard as to minimum and maximum tonnages, price, and the specifications, size, and grade of coal to be extracted

and loaded. This letter-offer was accepted by Pritchard on the 30th day of June 1936.

By letter-offer of April 28, 1937, Pritchard offered to extend and renew the agreement, as formerly extended and modified, from and after August 31, 1937, to September 1, 1938. Pritchard's offer further modified, supplemented, and amended the original agreement with respect to the maximum and minimum quantities of coal to be produced, and made certain price changes. It provided for yearly renewal subsequent to August 31, 1938, upon the same terms and conditions, not to exceed an aggregate of two years. This letter-offer was accepted by the Applicants on April 28, 1937. Pritchard has qualified for acceptance of the Code for Chilton Block No. 1 mine, but has not accepted.

(c) By letter dated May 25, 1937, from the receivers to Pritchard, the Receivers offered to become Code members and be liable for the one cent excise tax and assessments under the Act, but provision was included for adjustment of the per ton compensation payable to Pritchard, in the event he is compelled to pay the taxes and assessments. If the three mill per ton estimate of the assessments the Receivers will be obliged to pay proves excessive the contractor's compensation is to be adjusted upward. The offer was accepted by Pritchard on May 27, 1937. The original agreement for operation of the Chilton Block No. 1 mine by Pritchard stipulated that he pay all taxes whether on the land, imposed by Federal or state legislation, or otherwise.

(f) Pritchard is President of the Chilton Block Coal Company, assignor of the lease, from the Dingess-Rum Company, to Applicants. The former company, a Code member, operates the Chilton Block No. 2 mine and sells coal commercially. Pritchard also operates two commercial mines, both Code members, on his own account and in 1936 sold one million tons of coal from said mines and the Chilton Block No. 2 mine.

5. Each of the three leases previously discussed is terminable upon termination of the contract for operation of the particular mine for any reason stated in the contract.

The three contracts are terminable, among other reasons, if the Receivers are able at any time to purchase coal in the open market at a price per ton which is less than the amount paid by the Receivers to the lessors plus the payment to the contractor for his services and if the contractor within a given period fails to reduce his per ton rate to an extent which will either meet or undercut the market price. In the contract under which Peerless operates the Glamorgan mine a similar provision is found with respect to a rise in the cost of transportation of the coal to the Receivers. Peerless must absorb the increased cost of transportation of the

coal produced by it in so far as the aggregate cost of the coal to the Receivers would otherwise exceed the market price.

Each contract is terminable upon certain other specified conditions, including default by the contractor in performance of the terms thereof.

6. All coal of the specified quality mined by the Contractors under the lease and contract agreement herein, is consumed by the Applicants, except a small portion thereof sold to and consumed by the employees of the contractors. Provision is made in the contracts for the sale of coal to employees at the applicable "Code price." The Applicants have, in and by their several leases, contracts, offers, acceptances, and extensions and renewals thereof provided for the mining and loading into railroad cars of a minimum tonnage from the William Ann mine of 180,000 tons annually, at a minimum royalty of \$10,000; a minimum tonnage from the Glamorgan mine of 120,000 tons annually, at a minimum royalty of \$9,000; and a minimum tonnage from the Chilton Block No. 1 mine of 180,000 tons annually, at a minimum royalty of \$10,000. The Applicants used and consumed during the year 1936 approximately 1,000,000 tons of coal, of which approximately 40 to 50 per cent was supplied by the William Ann, Glamorgan, and Chilton Block No. 1 mines. The 1936 production of the William Ann mine was 240,000 tons, the Chilton Block mine 100,000 tons, the Glamorgan mine 80,000 tons.

7. The contractors receive monthly and weekly instructions from officials of Applicants giving the amounts of coal required by the Railway Company and destination points. The coal is inspected at the mines by Applicants' inspectors, and Applicants are required to pay the contractors for only that coal which is accepted as being of the requisite quality and grade. The contractors ship the coal from the mines, at Applicants' risk, to the Applicants at junction points along the lines of the Railway Company; the Applicants are then advised by the contractors by wire as to the number of cars shipped, including the individual car numbers of the cars so shipped. The wire is later confirmed by letter.

Each of the mines involved is located upon tracks other than those of the Railway Company and the coal, with Applicants as consignor and consignee, moves over such other lines on regular revenue billing to junction points upon the lines of the Railway Company. The William Ann mine is located on the tracks of the Norfolk & Western Railroad, and the coal from such mine is transported over that road and delivered to the Applicants on regular revenue billing, at their cost, at Petersburg and Durham, North Carolina, from where the coal is forwarded on Applicants'

company waybill over lines of the Railway Company to Ryan and Hartmen, Virginia, and Coolan and Gibson, North Carolina. The Glamorgan mine is located on the tracks of the Interstate Railroad Company, and coal from the mine is transported over that road on regular revenue billing, at Applicants' cost, and delivered to the Clinchfield Railroad Company at Miller Yard, Virginia, which railroad transports the coal on regular revenue billing to the Applicants at Bostick, North Carolina, from where it is forwarded over lines of the Railway Company on Applicants' company waybill to Wiggins, South Carolina, and occasionally Stubbs, North Carolina. The Chilton Block No. 1

mine is located on the tracks of the Chesapeake & Ohio Railroad and the coal from such mine is transported over the latter road on regular revenue billing, at Applicants' cost, and delivered to the Applicants at Richmond, Virginia, from which place it is forwarded on Applicants' company waybill over lines of the Railway Company to Apex, North Carolina, and Hann, Virginia.

All coal is inspected for quality before it is allowed to go into the chutes at unloading points.

8. Coal from the William Aan and Chilton Block No. 1 mines, located in West Virginia, is ordinarily consumed in and between the States of Virginia and North and South Carolina, and coal from the Glamorgan mine, located in Virginia, is ordinarily consumed in and between the States of North and South Carolina, Georgia, and Florida.

9. The movement of coal from each of the three mines across state boundaries to lines of the Railway Company and thereafter over the latter's lines across state boundaries to chutes at destinations constitutes interstate commerce in the coal.

10. Responsibility of the contractors for the coal mined by them ceases when the coal is accepted by Applicants' inspectors and loaded into cars at the mines. Invoices showing amounts and destinations of coal shipped are submitted to Applicants periodically by the contractors. Payments to the lessors and contractors are made by voucher approved by the Purchasing Agent and Audit Department of the Railway Company. Complete rejection of low quality coal after shipment is possible under the contracts, if the coal was not inspected at the mine, but this has never been done.

11. Daniel H. Pritchard and the Peerless Coal Corporation are independent contractors and are not under the control or management of the Applicants in the mining and the removing and loading of coal into railroad cars so long as the coal is produced and loaded safely and efficiently in the amounts as required by the monthly and weekly tonnage instructions issued

to the contractors by the Applicants. The contractors, individually and apart from the control or management of Applicants, pay the operating expenses of the mines, including power, maintenance, supply and repair charges, payrolls, personal-property taxes levied and assessed against the mining machinery, tips, and equipment, and Social Security taxes; and, independent of Applicants, the contractors employ and discharge their employees, carry Workmen's Compensation insurance, and in all ways assume responsibility for employees' welfare.

12. No interconnections exist between the Railway Company or Receivers thereof and the lessors and the contractors, or any of them, by means of stock ownership, interlocking directorates, common officials, or otherwise. The records of the Railway Company and the contractors are completely separate.

13. The Receivers of the Railway Company are not the "producer" of the coal mined from the three leased mines here involved.

14. It is a reasonable inference from the foregoing facts that the arrangements between the Receivers and the lessors and contractors were intended as a flexible contrivance by means of which the Receivers hoped to establish themselves as nominal producers of the coal consumed by them and thereby escape the price provisions of coal legislation, including the Act. Particularly noteworthy in this respect is the provision of the contracts permitting termination if the contractors do not reduce their compensation sufficient to meet the market price of coal; the inordinately short-term extensions made while the Carter Coal case was pending and while Congress was considering the 1936 coal legislation; the fact that Pritchard has a 30-year lease upon the William Ann mine, to begin immediately upon termination of the lease of the mine to the Receivers; and the general facility with which the contractors, and particularly Pritchard, can be converted into producers, within the meaning of the term in everyday usage.

Conclusions and opinion

The Seaboard Receivers seek exemption from Section 4 of the Bituminous Coal Act upon the basis of Section 4, H (1), which states:

"The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

Section 17 (c) contains the following definition of "producer":

"The term 'producer' includes all individuals, firms, associa-

tions, corporations, trustees, and receivers engaged in the business of mining coal."

1. The question presented to me for determination is whether the Seaboard Receivers, in fact and within the purpose and scope of this Act, are "in the business of mining" the coal here in question. Having due regard for all relevant facts, it seems to me that the Seaboard Receivers are not "engaged in the business of mining" the coal extracted from the leased mines.

I have had occasion recently to consider at some length an application for exemption raising questions similar to the one now before me In *The Matter of the Application of the Youngstown Sheet and Tube Company For Exemption*, Docket No. 503 FD; and the Conclusions and Opinion rendered in that case set forth the decisive factors to be considered in judging this application.

540 It is important with regard to a determination of whether Applicants are "engaged in the business of mining" the coal here involved that the coal is taken from the ground and loaded into cars not by Applicants or their employees, but by employees of Daniel H. Pritchard and the Peerless Coal Company. These contractors select and hire the workmen who do the actual work of mining the coal. The men are paid by the contractors, and directed and supervised by the contractors. The contractors are fully and solely liable for injury to the men, and otherwise responsible for their welfare and working conditions. Similarly, the contractors are liable for injury to other persons or to property occasioned by the work of coal mining. The contractors furnish and maintain and direct the operation of all supplies, equipment, machinery, and facilities for coal production. In brief, the actual work of coal mining is performed by the contractors and Applicants do not participate therein. Applicants are not concerned with the manner in which the coal is mined and do not control the manner or means of production. They are interested only in securing coal of the proper quality as it is needed in the operation of the railroad.

Nor have Applicants assumed such of the normal burdens and risks of one who is in fact "engaged in the business of mining" as to justify the conclusion that they are in that business. The basic purpose of this Act is to enable "producers" to whom it applies to realize their weighted average cost of production. That being true, it is significant that Applicants do not pay the costs of mining this coal. Virtually all costs are borne by the contractors. Thus, the major item of cost, wages for labor, is paid by the contractors. The contractors furnish all equipment,

machinery, production facilities, and supplies and bear the cost of maintenance and power for the machinery and equipment. Insurance of all kinds including Workmen's Compensation and casualty insurance is carried by the contractors. Taxes or assessments upon the mines, premises, buildings, or equipment or on the rights or privileges in connection with operating the mines are payable by the contractors. Only upon the William Ann mine do Applicants pay the real-estate taxes, the lessors paying such taxes on the other land leased. Social Security taxes are paid by the contractors. The contractors are responsible for all penalties or fines imposed for violation of law by themselves or their workmen. Also included among the expenses which the contractors must bear are attorneys' fees and cost of litigation. Thus, the contractors, as expressly provided in the contracts, at their sole expense, perform all service and work and furnish all labor, materials, supplies, machinery, and equipment necessary or convenient for the performance of all the work of extracting, mining, manufacturing, transporting, and loading the coal. And as a necessary result of this, the risk of profit or loss incurred in mining the coal is assumed by the contractors.

Of further significance with reference to business burdens and risks is the fact that Applicants have made no investment in coal-bearing lands. Although the leases require payment of minimum royalties, the leases are terminable upon termination of the contracts. The contracts are terminable upon conditions stated therein and for breach in the terms thereof and upon another important condition hereinafter discussed. Royalties for coal mined, as distinguished from minimum royalties, are paid only for coal mined and transported from or used on the premises. Furthermore, the contractors assume all duties and liabilities to the lessors of the mines. In addition, as has been noted, all equipment, machinery, buildings, and supplies are furnished by the contractors.

The Applicants do not have even a minimum producer's investment or proprietary interest in the production of this coal. The costs of production are paid by the contractors. The normal incidents and burdens of one who is engaged in the business of mining coal do not rest upon Applicants, but upon the contractors.

In view of these many important factors I am of the opinion that Applicants are not a producer of coal within the contemplation and design of the Act. The work of coal mining is performed, paid for, and controlled by the contractors. They are paid a fixed sum per ton for coal of the specified quality which is accepted at the mine by Applicants' inspectors. The transaction has the aspects of an ordinary commercial sale and, indeed,

it appears that Applicants stand in a position not materially different from that of any large consumer who dominates a small source of supply or who has contracted for the total product of a given manufacturing enterprise or tract of land. In every real sense, with respect to the supply of coal obtained from these contractors, Applicants have not become a "producer" but have rather left their "consumer" position and mobility unchanged. This mobility is demonstrated quite pointedly by the contract provisions permitting Applicants to terminate the contract if they can obtain coal in the open market at a lower price than under the present arrangement, provided that the contractors do not reduce their compensation sufficient to meet the market price. The leases are terminable upon termination of the contracts.

The existence of the contracts for operation of the leased mines does not warrant a determination that Applicants are a producer in view of the facts of record. To so decide would do violence to the Act's meaning and intended scope.

Although the question whether the Applicants are the "producer" seems to me to be a question of fact and judgment, rather than a question of law, Applicants in their brief have cited and relied upon several cases. These citations are all either irrelevant or readily distinguishable. The Bituminous Coal Act 541 was not involved in any of the cited cases. We are dealing here with legislation the enactment of which was prompted by conditions peculiar to the coal industry. Its purpose is to regulate the coal industry and thereby ameliorate those conditions. All determinations calling for interpretation and application of the Act must necessarily be made with full cognizance and consideration of the Act's purpose and historical background. Cases decided under other laws—tax statutes, bankruptcy statutes—provide little aid in the resolution of controversies arising under the Coal Act.

Moreover, none of Applicants' citations seem apposite. Thus, the case most strongly urged in the briefs is *Oliver Iron Mining Company v. Lord*, 262 U. S. 172 (1922). In that case the problem was one of proper classification under a Minnesota occupation tax statute levying a tax upon all who were "engaged in the business of mining or producing iron ore or other ores." The decision merely holds that if a State wishes to tax the owner or lessee of ore lands upon the net value of the ore at the surface, rather than tax the several contractors to whom the various labors of mining were allocated, the Supreme Court will not disturb the classification.

The *Oliver* case presents a different fact situation and entirely different legal considerations. Other cases referred to by the

Applicants are even less demanding of acknowledgement than the Oliver case. Indeed, when legal precedents are scanned, it is discovered that the most apposite and persuasive of the decisions will serve to sustain the conclusions that the Seaboard Receivers are not producers of coal.¹

II. In addition to claiming exemption under Section 4, II (1) upon the ground that they produce the coal in question, Applicants assert that the Act cannot be validly applied to the situation revealed by the application and the record. Applicants contest the constitutionality of an application of the Act to this coal. Applicants' position in this regard, however, is grounded upon the validity of their contention that there can be no commerce in the coal mined by the contractors from the leased mines and shipped to and consumed by Applicants. Section 4, which composes the Code, is expressly made applicable to "matters and transactions in or directly affecting interstate commerce in bituminous coal." And, in the present situation there occur, in addition to production, matters and transactions in interstate commerce in the coal involved.

When the coal is extracted, accepted by the inspectors, loaded into cars, and delivered to the Receivers there is a substantial and fundamental change in the nature of the control over and interest in the coal. This change constitutes a sale, transfer, or disposition of title to or an interest in the coal and clearly constitutes a "matter" or "transaction" within the meaning of the quoted language of Section 4 of the Act. The transportation of the coal from each of the mines across state lines to the lines of the Railway Company and thereafter across other state lines by the Railway Company establishes it as a "matter and transaction in * * * interstate commerce in bituminous coal."²

The fact that Applicants are lessees of the three mines does not preclude the existence of commerce in the coal. Nor is it necessary to make a precise distinction with respect to whether Applicants' leases are legally to be regarded as sales of the coal in place or as grants of an exclusive mining privilege, although the language of the instruments, the unusually short terms, and other factors clearly warrant the latter conclusion.

¹ *People v. Horn Silver Mining Company*, 105 N. Y. 76, 11 N. E. 156 (1887), affirmed 143 U. S. 305 (1892); *Commonwealth v. Williamsport Rail Company*, 250 Pa. 596, 95 Atl. 795 (1915); *People ex rel. Jewelers Circular Publishing Company v. Roberts*, 155 N. Y. 1, 49 N. E. 248 (1898); *Dayton Brass Castings Company v. Gilligan*, 267 Fed. 872 (S. D. Ohio, 1920), on appeal, 277 Fed. 227 (C. C. A. 6th, 1921), cert. denied 258 U. S. 619 (1922); *In re Johnson*, 149 Fed. 864 (N. D. N. Y., 1907).

² *Northwestern Improvement Company v. Lekeg*, No. 448, C. C. A. 8th, March Term, 1940, decided April 25, 1940; *Currin v. Wallace*, 306 U. S. 1 (1939). See also *United States v. Hill*, 248 U. S. 424 (1919); *Valvoline Oil Co. v. United States*, No. 25, October Term, 1939, decided November 13, 1939, 84 L. ed. (adv. op.) 112.

Thus, the transactions in this coal are subject to the regulatory provisions of the Act.

For the foregoing reasons the exemption requested in the instant application must be denied.

542 An appropriate order will be entered in the matter.

Dated June 14, 1940. Washington, D. C.

H. A. GRAY,

H. A. Gray, *Director*.

543 *Affidavit of service and publication*

CITY OF WASHINGTON,

District of Columbia, ss:

E. C. Faris, Jr., Employee of the Bituminous Coal Division of the Department of the Interior, being first duly sworn, on his oath deposes and says: That he served upon the Director of the Consumers' Counsel Division of the Department of the Interior, upon the Secretary of each District Board, upon each Statistical Bureau of the Bituminous Coal Division, upon the Commissioner of Internal Revenue, upon L. C. Brinson, Jr., (Registered Mail), upon B. T. Ansell (Regular Mail), and upon Jos. F. Johnson (Registered Mail), true and correct copies of Order Denying Application for Exemption and Findings of Fact, Conclusions, and Opinion of the Director, entered in Docket No. 49-FD on June 14, 1940, true and correct copies of which are attached hereto and made a part hereof, by mailing them properly addressed with postage prepaid to the above-named parties on June 18, 1940, and that he forwarded on June 15, 1940, to the Division of the Federal Register, the National Archives, in accordance with its regulations, the required number of copies of the Order Denying Application for Exemption for publication in the Federal Register, and that said Order was published in the Federal Register in the issue for June 18, 1940, Volume 5 at pages 2271 and 2272.

(sgd) E. C. FARIS, JR.

Subscribed in my presence and sworn to before me this 29th day of June 1940.

[SEAL]

(sgd) IRENE L. WIESE,

Notary Public.

My Commission Expires 12 1 41.

544 [Certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

Order allowing certiorari

Filed January 6, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 44952, 44987. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 603. H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, et al., Petitioners, vs. Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company. Filed November 30, 1940, December 19, 1940, Term No. 603 O. T. 1940, 638 O. T. 1940.

PROCEEDINGS IN THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4671

LEAH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS
OF SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

VS.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF
THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS
SECRETARY OF THE INTERIOR, AND BITUMINOUS COAL PRODUCERS
BOARD FOR DISTRICT NO. 8, INTERVENOR, RESPONDENTS

On Petition to Review an Order of the Bituminous Coal Division
of the Department of the Interior

June 26, 1940, petition of Receivers to review an order of
the Bituminous Coal Division of the Department of the Interior,
Docket No. 49 FD, denying their application for exemption
under the provisions of the Bituminous Coal Act of 1937, is
filed in Open Court before Parker, Soper, and Dobie, Circuit
Judges, and the cause is docketed.

(Memo. of Clerk:) The said petition to review is in the words
following, to wit:

By the United States Circuit Court of Appeals for the Fourth
Circuit

LEAH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF
SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

VS.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF
THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS
SECRETARY OF THE INTERIOR, RESPONDENTS

*Petition of receivers to review an order of the Bituminous Coal
Division of the Department of the Interior, Docket No. 49 FD,
denying their application for exemption under the provisions
of the Bituminous Coal Act of 1937*

1. Petitioners are Receivers of the properties of Seaboard Air
Line Railway Company by virtue of their appointment by the
United States District Court for the Eastern District of Virginia,

in the cause entitled "Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees, et al., Complainants, against Seaboard Air Line Railway Company, et al., Defendants, Consolidated Cause in Equity No. 214." Said Receivers are residents of the State of Virginia and have their office and principal place of business in Norfolk, Virginia, within the Fourth Judicial Circuit.

2. Pursuant to the provisions of Section 4 H (1), and in accordance with the provisions of Section 4-A of the Bituminous Coal Act of 1937 (15 U. S. C. A., Secs. 828, 851, 50 Stat. 72), the Receivers filed with the National Bituminous Coal Commission their application requesting exemption from the regulatory provisions of the Act of the coal produced at certain mines in Virginia and West Virginia, hereinafter described, and shipped from the mine by or for account of petitioners to themselves and consumed by them in the operation of the railroads operated by them. Hearings upon said application were duly held before an Examiner of the Commission on September 22nd and 23rd, 1937. The Examiner thereafter submitted his report and proposed findings of fact and conclusions, recommending denial of the application, and petitioners filed exceptions to the report. Thereafter, on July 1, 1939, the functions of the National Bituminous Coal Commission were transferred to the Bituminous Coal Division of the Department of the Interior pursuant to the President's Reorganization Plan No. II, Secs. 4 (a) and 4 (b), and approved by the Congress. Public Res. No. 20, 76th Congress, 1st Session, c. 193. Arguments on the exceptions to the Examiner's report having been had before the Director of the Bituminous Coal Division, the Director overruled the exceptions and entered an order denying the application for exemption under date of June 14, 1940. Docket No. 49 FD. On the original submission before the Examiner, and on submission of exceptions before the Director, petitioners, both orally and in brief, raised the questions hereinafter presented, asserting the illegality of the proposed order and the unconstitutionality of the proposed application of the Act under the circumstances presented by the record.

3. Respondent H. A. Gray is Director of the Bituminous Coal Division in the Department of the Interior by appointment of the Secretary of the Interior and is charged by law and by proper orders of said Secretary with the administration of the Bituminous Coal Act of 1937. Respondent Harold L. Ickes is Secretary of the Interior and is charged by the provisions of Section 4-A of said Reorganization Plan with the direction and supervision of the Respondent Gray in the administration of the Bituminous Coal Act.

4. This petition is filed in accordance with the provisions of Section 6 (b) of the Bituminous Coal Act, 15 U. S. C. A., Sec. 836 (b), which provides in part that:

"(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

5. Petitioners' application for exemption, denial of which is the basis for this petition, is based upon the provision of Section 4-II (1) [15 U. S. C. A., Sec. 833 (1)] that the regulatory and tax penalty provisions of the Act "shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." It is also based upon petitioners' contention that by the terms of the Act itself said provisions thereof do not apply to coal produced at any of these mines for the reason that no sale of or transfer of title to the coal by the producer thereof occurs, but that if said provisions of the Act are held applicable to the production of the coal involved they are unconstitutional and void. Petitioners assert that they are the producers of the coal at the several mines here involved, within the meaning of this section, and are, accordingly, entitled to an order exempting the coal from the regulatory and penalty provisions of the Act. The facts as to the operations of the three mines for which the exemption is sought are briefly as follows:

(a) The Receivers are lessees of approximately 4,000 acres of coal land in Mingo County, West Virginia, known as the William-Ann mine, by lease executed May 1, 1934. By the terms of the lease petitioners are granted the sole and exclusive right to mine the coal for their own use, and agree to pay a royalty of nine cents per net ton, subject to a minimum annual royalty of \$16,200, which may, under certain contingencies (which have not occurred) be reduced to \$10,000 per annum. The lease also requires the petitioners to pay taxes and assessments on the lands leased and contains renewal provisions which have from time to time been exercised.

(b) Contemporaneously with the execution of the lease of the William-Anne mine, petitioners entered into a contract with Daniel H. Pritchard under which Pritchard was to perform the work of mining the coal for the Receivers in such quantities and at such times as specified by them. The contract provides

that the contractor shall be compensated for his services on a per ton basis specified in the contract for the coal mined with adjustments to meet variations in wages, taxes, and other cost factors beyond the control of the contractor. The said Pritchard holds no right, title, interest or estate either in the lands or in the coal leased to the Receivers.

(c) In July 1935, petitioners by assignment to them by Chilton Block Coal Company and written assent thereto by Dingess-Rum Coal Company, the land owner leased from Dingess-Rum Coal Company a tract of coal land in Logan County, West Virginia, known as Chilton Block No. 1 mine. Under this lease the current royalty payable by petitioners to the land owner was ten cents per ton and petitioners did not assume the obligation to pay taxes assessed upon the leased lands. The lease from Dingess-Rum Coal Company of the tract of coal land of which Chilton Block No. 1 mine is a part provides for payment by the lessee of an annual minimum rent or royalty of \$15,000 from coal mined from both the Chilton Block No. 1 and No. 2 mines. By virtue of the terms of the above mentioned lease to petitioners by Dingess-Rum Coal Company petitioners became obligated to pay to Dingess-Rum Coal Company the proportionate part referable to Chilton Block No. 1 mine, of this minimum royalty in the event and to the extent that the tonnage produced from the Chilton Block No. 1 mine computed at ten cents per ton did not equal the amount of such proportionate part of this minimum royalty.

(d) Contemporaneously with the execution of the lease of the Chilton Block No. 1 mine, petitioners entered into a contract with Daniel H. Pritchard containing terms substantially identical with those embodied in the contract to operate the William-Ann mine, whereby Pritchard would mine the coal for the Receivers for an agreed per ton compensation, subject to adjustment for variations in wages, taxes, and other specified costs over which the contractor had no control.

(e) On July 12, 1934, petitioners leased from Glamorgan Coal Land Corporation 4,000 acres of coal land in Wise County, Virginia, known as the Glamorgan mine. This lease obligates petitioners to pay a minimum royalty of from \$800 to \$1,000 per month and a current royalty—originally ten cents per ton and later reduced to eight cents per ton by agreement between petitioners and the land owner. In other respects the provisions of this lease are substantially the same as those contained in the lease of the William-Ann mine.

(f) Concurrently with the execution of the lease of the Glamorgan mine, the Receivers entered into a contract with Glamorgan Coals, Inc., a Virginia corporation, for the mining of the coal

by the contractor, at an agreed compensation per ton specified in the contract, subject to variations to meet changes in the prices of labor, materials, taxes, and other specified cost elements beyond the control of the contractor. Since the execution of the contract Glamorgan Coals, Inc., has been succeeded by Peerless Coal Corporation, a Virginia corporation, as contractor. There is no identity of interest, direct or indirect, between Glamorgan Coal Land Corporation or Peerless Coal Corporation and Glamorgan Coals, Inc., which are separate and distinct corporations with wholly separate and different stockholders and officers.

(g) The purpose of the agreement between the Receivers and their contractors was to insure the Receivers that their mines would be operated efficiently and economically and so as to produce a regular and dependable supply of coal for petitioners' own use. In anticipation of unforeseen fluctuations in the price of labor and materials affecting production costs and beyond the control of the contractors, the contracts each provided in effect that the compensation payable by petitioners thereunder to the contractors should be increased or decreased as such changing conditions made it necessary. In accord with such provisions, at the end of each contract period the contractors have presented their statements to petitions of such additional cost as may have been incurred and have been reimbursed therefor by petitioners.

6. Each of said leases has from time to time been renewed and extended according to its terms, and is now in effect. By virtue and upon execution of each of the leases petitioners acquired a vested property interest in the coal in place in the leased land. Neither Daniel H. Pritchard, with respect to the William-Ann and Chilton Block No. 1 mines, nor the Peerless Coal Corporation, with respect to the Glamorgan mine, has or claims any title or interest whatever in any of the coal lands nor any of the coal involved in petitioners' claim for exemption.

7. All coal produced from each of the mines, except negligible quantities sold to mine employees, is loaded in railroad cars and shipped by petitioners to themselves and consumed by them.

8. Minimum prices for the sale of coal by members of the Bituminous Coal Code are about to be established and made effective by the Director, as required by the Act. Petitioners are advised that the minimum price to be established for coal in the classification of that produced at petitioners' mines will be \$2.15 per ton for the coal from the William-Ann mine, \$1.95 for the coal from the Glamorgan mine, and \$2.15 for the coal from the Chilton Block No. 1 mine. If as a result of the order here appealed from petitioners are required to pay to their contractors these minimum or so-called code prices, the increased cost of obtaining the coal which is owned by petitioners and consumed by them will amount

to not less than \$166,000 annually. This consequence will flow from the order although petitioners own and consume the coal and despite the fact that contractors have no interest in the coal, no interest or investment in the lands, and have not been found or held by the Director to be either the owners or the producers of the coal.

9. The Director has made what purports to be a finding of fact, but which is a mere conclusion of law, that the Receivers are not the producers of the coal mined from the leased lands. Insofar as this is a finding of fact, it is not supported by any substantial evidence in the record. As a legal conclusion of the nonapplicability of the exemption provision of the Act to the petitioners under the circumstances presented by the record, it is erroneous.

10. The Director erred in the conclusion that "the transactions in this coal are subject to the regulatory provisions of the Act." The order fails to specify in what way the so-called "transactions" can be regulated. There is no finding that a sale of coal takes place at any time between the contractors and petitioners, and no such finding could be made. The effect of the order is to require petitioners to pay to their contractors the minimum market prices as they are fixed from time to time by the Director. Since the coal is at all times owned by petitioners and not by the contractor, any requirement that the latter be paid any particular price for the coal by the petitioners is not authorized by the Act and results in compelling petitioners to pay to their contractors not only the amounts agreed upon as reflecting the reasonable cost of mining the coal plus compensation for the services of the contractor, but an additional sum representing the value of the coal already owned by petitioners, and for which they are obligated to pay the fee owner and not the contractor.

11. If the Act can be properly construed as requiring payment of fixed minimum prices to petitioners' contractors under the circumstances presented by the record before the Director, it would as so construed deprive petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States.

12. If the regulatory provisions of the Act be construed to apply to petitioners under the circumstances presented by the record, the Act is to that extent not within the powers of Congress, under the commerce or any other clause of the Constitution, and is void.

13. The order is not authorized by the Bituminous Coal Act.

14. The order if enforced will deprive petitioners of their property without due process of law, in violation of the Fifth Amendment.

15. By reason of the fact that petitioners will be compelled to expend great additional sums in the procurement of the coal from their mines, petitioners will be irreparably injured, and to the extent of not less than \$166,000 annually, unless the court will grant a stay of the order pending a final determination of this appeal as contemplated by Section 6 (b) of the Act.

Premises considered, Petitioners pray:

(a) That the Court take jurisdiction of this petition and cause proper process to issue to respondents H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, and Harold L. Ickes, as Secretary of the Interior, directing them to file with the Clerk a full and complete transcript of the record upon which the order purports to be based, and to appear herein as required by the Bituminous Coal Act.

(b) That pending final determination hereof, the court enter an order staying and suspending the application and effect of the order appealed from, to the end that petitioners will be exempt from the application of the regulatory provisions of Section 4 of the Bituminous Coal Act pendente lite.

(c) That upon final consideration the court will set aside and reverse the order, and direct that an order be entered by respondents recognizing and granting the exemption from the regulatory provisions of Section 4 of the Bituminous Coal Act to which they are entitled.

(d) That the costs of this proceeding be taxed against respondents.

Respectfully submitted,

LEGH R. POWELL, JR., and
HENRY W. ANDERSON,

as Receivers of Seaboard Air Line Railway Company,

By W. R. C. COCKE,
JOS. F. JOHNSTON,

Their Attorneys,

513 Seaboard Railway Building, Norfolk, Virginia.

JUNE 25, 1940.

STATE OF VIRGINIA,

City of Norfolk, ss.

Jos. F. Johnston, being first duly sworn, deposes and says that he is Assistant General Counsel for Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, petitioners herein, and that he is authorized to sign and verify said petition on behalf of the said petitioners; that he has read the foregoing petition and knows the contents there-

of, and that the allegations contained therein are true according to his best knowledge and belief.

JOS. F. JOHNSTON.

Subscribed and sworn to before me this 25th day of June 1940.

[NOTARIAL SEAL]

W. H. WALLACE, JR.,

Notary Public.

My Commission Expires April 14, 1943.

Same day, to wit, June 26, 1940, the appearance of W. R. C. Cocke and Jos. F. Johnston is entered for the petitioners.

Same day, notification to the respondents, together with copy of petition, transmitted by mail to Abe Fortas, Esq., General Counsel, Bituminous Coal Division of the Department of the Interior, Washington, D. C.

(Memo. of Clerk:) The said notification is in the words following, to wit:

Notification of the filing of a petition to review an order of the Bituminous Coal Division of the Department of the Interior, Docket No. 49-FD, denying application for exemption under the provisions of the Bituminous Coal Act of 1937, issued June 17, 1940.

[Style of Court and title omitted.]

To Abe Fortas, Esq., General Counsel, Bituminous Coal Division of the Department of the Interior, attorney of record for H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, and Harold L. Ickes, as Secretary of the Interior, Respondents:

You are hereby notified that the attached is a true copy of the Petition of the Petitioners for Review of an Order of the Bituminous Coal Division of the Department of the Interior filed in the said United States Circuit Court of Appeals for the Fourth Circuit, at Asheville, N. C., on June 26, 1940, in the above-entitled action.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Asheville, North Carolina, this 26th day of June, A. D. 1940.

[SEAL]

CLAUDE M. DEAN,

Clerk of the United States Circuit Court of Appeals for the Fourth Circuit.

Notice of motion of petitioners for suspension order

Filed July 1, 1940

[Style of Court and title omitted.]

To ABE FORTAS, Esq., *General Counsel, Bituminous Coal Division,
United States Department of the Interior,
734 Fifteenth Street, NW, Washington, D. C.*

SIR: You are hereby notified that on Tuesday, July 2, 1940, at 10:30 o'clock A. M., at Asheville, North Carolina, in the Courtroom of the United States Circuit Court of Appeals for the Fourth Circuit, the undersigned, counsel for Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers, petitioners, will call up for hearing and determination the motion of the said Receivers for the entry of an order by said Court staying and suspending the application and effect of the order of the Bituminous Coal Division of the Department of the Interior, Docket No. 49 F. D., denying their application for exemption under the provisions of the Bituminous Coal Act of 1937, pending final hearing and determination of their appeal taken in said Court to review the said order. A copy of the petition of the Receivers to review said order and praying inter alia for the entry of an order staying and suspending the application and effect of the order appealed from is hereto annexed and made a part of this notice.

W. R. C. COCKE,

JOS. F. JOHNSON,

*Attorneys for Leigh R. Powell, Jr.,
and Henry W. Anderson, Petitioners.*

Dated at Norfolk, Virginia, June 27, 1940.

Same day, to wit, July 1, 1940, the appearance of Abe Fortas, General Counsel; Harold Leventhal and Arnold Levy, Attorneys, Bituminous Coal Division of the Department of the Interior, is entered for the respondents.

July 2, 1940, the transcript of record is filed.

Same day, response of respondents to motion of petitioners for suspension order is filed.

Argument of cause on motion of petitioners for suspension order

July 2, 1940 (June term, 1940), cause came on to be heard on the motion of petitioners for suspension order before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order suspending order of Bituminous Coal Division and setting case for argument on the merits

Filed and Entered July 2, 1940

[Style of Court and title omitted.]

On consideration of the application of the petitioners for a stay of Order of the Bituminous Coal Division of the Department of the Interior, and the argument of counsel thereupon had as well in support of as against the same.

It is ordered by this Court that the order of the Bituminous Coal Division of the Department of the Interior in Docket No. 49-FD, denying to the petitioners exemption of certain transactions in coal under the provisions of Section 4-II (1) of the Bituminous Coal Act of 1937, be, and the same is hereby, suspended pending final determination of the petition to review in the above-entitled case.

It is further ordered that this case be, and the same is hereby, assigned for argument on the merits on July 18, 1940, at Baltimore, Maryland; that the brief and appendix on behalf of the petitioners be filed on or before July 12, 1940, and that the brief and appendix on behalf of the respondents be filed on or before July 15, 1940.

July 2, 1940.

JOHN J. PARKER,

Senior Circuit Judge.

Same day, to wit, July 2, 1940, a copy of the foregoing order is transmitted to counsel for each side.

Petition of Bituminous Coal Producers Board for District No. 8 for leave to intervene

Filed July 11, 1940

[Style of Court and title omitted.]

Comes now Bituminous Coal Producers Board for District No. 8, by its attorneys, and petitions the Court for leave to intervene herein as a party respondent for the purpose of urging affirmance of the order of the Director of the Bituminous Coal Division, Department of the Interior, dated June 14, 1940, sought by Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, to be reviewed herein. Said Bituminous Coal Producers Board for District No. 8 is hereinafter referred to as "District Board"; said Director of the Bituminous Coal Division, Department of the Interior, is hereinafter referred to as

"Director"; and said Legh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, are hereinafter referred to as "Receivers."

The District Board has an interest in the above-entitled proceeding which will be adversely affected by any order of this Court which does not affirm the aforesaid order of the Director. The nature of such interest and the grounds upon which intervention herein is sought are as follows:

1. The District Board is that district board, organized and existing under section 4, part I (a) of the Bituminous Coal Act of 1937, 50 Stat. 72, 15 U. S. C., Secs. 828-851, hereinafter referred to as "Act," for the purpose of administering the provisions of the Act in respect of the code members of District 8, as said district is defined and limited by the annex to the Act entitled "Schedule of Districts." The District Board is duly elected by the code-member producers of District 8 and otherwise selected as provided by said section 4, part I (a) of the Act and is presently composed of the following members, eight of whom are elected by the majority in number of the said code members represented at the election meeting or are elected by the district-board members so elected in the place of any member so elected who may vacate his office, eight of whom are elected by votes cast in the proportion of the annual tonnage output of the code members in said District for the calendar year 1938 or are elected by the district-board members so elected in the place of any member who may have vacated his office, and one of whom has been selected by United Mine Workers of America, the organization of employees representing the preponderant number of employees in the bituminous coal industry in District 8:

A. F. Allan, Assistant Vice President, Consolidated Coal Company, 2432 Buhl Building, Detroit, Michigan.

Rolla D. Campbell, General Counsel, Island Creek Coal Company, Robson Pritchard Building, Huntington, West Virginia.

D. B. Cornett, President, Cornett-Lewis Coal Company, 309 Coleman Building, Louisville, Kentucky.

W. J. Cunningham, President, Crummies Creek Coal Company, Crummies, Kentucky.

Fred E. Gore, Vice President, Blue Diamond Coal Company, 615 Transportation Building, Cincinnati, Ohio.

D. D. Hull, President, Virginia Iron Coal and Coke Company, Roanoke, Virginia.

S. P. Hutchinson, Jr., Assistant to General Sales Manager, General Coal Company, 123 South Broad Street, Philadelphia, Pennsylvania.

J. E. Johnson, Sr., President, Darb Fork Coal Company, 509 East Main Street, Lexington, Kentucky.

John A. Kelly, President, Guyan Eagle Coal Company, Huntington, West Virginia.

Harry LaViers, Vice-President, South-East Coal Company, Paintsville, Kentucky.

A. F. Leckie, President, Leckie Coal Company, Inc., 706 Hartman Building, Columbus, Ohio.

E. C. Mahan, Chairman of the Board, Southern Coal and Coke Company, Hamilton Bank Building, Knoxville, Tennessee.

C. M. Moore, President, Moore Coal Company, Hamilton Bank Building, Knoxville, Tennessee.

D. H. Morton, President, Winifrede Collieries, Charleston, West Virginia.

M. L. Patton, Vice-President, Truax-Traer Coal Company, 2715 Carew Tower, Cincinnati, Ohio.

L. E. Woods, President, Crystal Block Coal and Coke Company, 1306 West Virginia Building, Huntington, West Virginia.

Sam Caddy, 1408 First National Bank & Trust Company, Building, Lexington, Kentucky.

2. The controversy and review sought by the Receivers herein arises over the order of the Director, based upon his findings of fact and conclusions of law, denying the application of the Receivers for exemption from the regulatory provisions of the Act of substantially all of the coal produced at William Ann mine in Mingo county, West Virginia, Chilton Block No. 1 mine in Logan county, West Virginia, and Glamorgan mine in Wise county, Virginia, all of said mines being located in said District 8 and all of said coal being subject, in its sale or other disposal, to the jurisdiction of the District Board unless exempt from said regulatory provisions of the Act. If the Receivers "produce" said coal within the meaning of said term ("producer") as used in section 4, part II (1) of the Act, the District Board has no authority over or assertable interest in its sale or other disposal to the Receivers whatsoever; if, on the other hand, the Receivers do not "produce" said coal within such meaning of said term, the District Board has authority over and assertable interest in its sale or other disposal to the Receivers as set out with some particularity in paragraphs numbered "3" and "4" hereof.

3. As such District Board for District 8, the District Board is charged by the Act with the performance of various powers and duties relating to the administration of the Act in respect of said District 8, the code members thereof, and the coal sold or otherwise disposed of thereby. Such powers and duties include, among others, the determination of the weighted average of the total costs of the ascertainable tonnage produced in District 8 in the calendar year 1936 (section 4, part I, (a)), the

adjustment of the average costs so determined as may be necessary to give effect to any changes substantially affecting costs so as to reflect as accurately as possible any change which may have been established since January 1, 1936 (section 4, part I (a)), the submission of such determination, together with such adjustment and the computations upon which it is based, to the Director as a factor in the Director's determination of the weighted average of the total costs of the tonnage for Minimum Price Area 1 in the calendar year 1936, adjusted as aforesaid, which determination of the weighted average of the total costs of said Minimum Price Area shall be taken as the basis for the proposal and establishment of minimum prices (section 4, part I (a)), the proposal of minimum prices from time to time, either upon its own motion or upon direction by the Director, for kinds, qualities, and sizes of coal produced in District 8 so as to yield a return per net ton for such district equal as nearly as may be to the weighted average of the total costs per net ton, of the tonnage of such Minimum Price Area (section 4, part I (a)), the submission of such proposal of minimum prices, together with the data upon which they are computed, including the factors considered in determining the price relationship, to the Director who may approve, disapprove, or modify such proposed minimum prices to serve as a basis for coordination (section 4, part I (a)), the coordination of the minimum prices approved by the Director for such purpose in respect of District 8 with the minimum prices approved by the Director for such purpose for other districts in common consuming market areas (section 4, part II (b)), and the submission of such coordinated prices, together with the data upon which they are predicated to the Director who shall thereupon establish effective minimum prices (section 4, part II (b)).

4. In order to enable it to perform the various powers and duties relating to the administration of the Act imposed upon it by the Act, all as described in the paragraph hereof numbered "3," the District Board has the power and duty to appoint officers from within or without its own membership, to fix their terms and compensation, to provide for reports, and to employ such committees, employees, arbitrators, and other persons necessary to effectuate such purpose (section 4, part I (a)). In exercise of such power and duty, the District Board has appointed officers both from within and without its own membership, has fixed their terms and compensation (with reference only to officers appointed from without its own membership), has provided for reports from code members, and has employed technical and clerical employees and legal counsel, commensurate with the

task of effectuating its purpose. The expense incurred by the District Board in the performance of the various powers and duties relating to the administration of the Act imposed upon it by the Act, all as described in the paragraph numbered "2" and in this paragraph is imposed upon the code members of District 8, each paying his proportionate share, as assessed, computed on a tonnage basis, in accordance with regulations prescribed by the District Board with the approval of the Director (section 4, part I (b)). In the performance of its various powers and duties, and especially those set out with particularity in paragraph numbered "3" hereof, it is required that the District Board determine or have determined who is the producer of the coal for which exemption from the regulatory provisions of the Act is sought by the Receivers, whether such coal and its sale or other disposal is exempt from such provisions of the Act, and the effect that the exemption of such coal and its sale or other disposal, if provided by the Act, will have upon costs, minimum prices proposed by it for the code members of District 8, and minimum prices coordinated by it for such code members. Such determination is necessary in order that the District Board may properly determine, adjust, and submit the weighted average of the total costs of District 8 in 1936, propose minimum prices for the coals of District 8, and coordinate such prices, all within the standards of the Act and as set out in paragraph numbered "3" hereof. Also, such determination is necessary in order to enable the District Board properly to adjust its budget and assessments in respect of its expenses for its administration of the Act in respect of District 8, as set out in said paragraph numbered "3" hereof.

5. The District Board, perceiving its interest in the matter of the aforesaid application of the Receivers, as described in the preceding paragraphs hereof, duly filed its petition for leave to intervene in the matter before the National Bituminous Coal Commission (the predecessor of the Director) in accordance with Rule VIII, paragraph (b) of Rules of Practice and Procedure before the Commission promulgated June 23, 1937. Such petition for leave to intervene was granted, and the District Board appeared at the hearings before the Examiner of the National Bituminous Coal Commission and before the Director and participated therein as a party to the proceeding.

6. The intervention of the District Board is necessary to protect the interests of the District Board and of District 8 and the code members thereof herein because:

(a) the District Board has no remedy other than intervention to protect such interests which will be determined herein;

(b) the interests of the District Board and of District 8 and of code members thereof are not adequately represented by any

of the interested parties to the cause, and they will be affected by any final order herein;

(c) the District Board has a right to appear herein as a party under the provisions of the Act, particularly section 6 (b) thereof; and

(d) the intervention of the District Board, prayed as set out hereinbelow, will not unduly delay or prejudice the adjudication of the rights of the parties herein.

Wherefore, the District Board prays:

First. For leave to intervene herein and to become a party hereto for its own interests and the interests of District 8 and of the code members thereof in the same manner and with like effect as if named in the petition of the Receivers (except the right to participate in the designation of the record which the District Board hereby waives in order that its intervention not delay adjudication of the rights of the parties herein and for that reason only), with right to argue and to file briefs upon all matters and issues raised by the proceedings;

Second. The relief prayed for in the petition of the Receivers be denied and the said petition be dismissed; and

Third. For such other and further relief as the Court may deem just and equitable.

BITUMINOUS COAL PRODUCERS BOARD
FOR DISTRICT NO. 8.

By BURR TRACY ANSELL,

Burr Tracy Ansell,

712 Tower Building, Washington, D. C.,

WILLIAM A. GRIMES, (B. T. A.),

William A. Grimes,

Baltimore Trust Building, Baltimore, Maryland,

Its Attorneys.

DISTRICT OF COLUMBIA, ss:

Burr Tracy Ansell, one of the attorneys for Bituminous Coal Producers Board for District No. 8 hereinabove subscribed, being duly sworn, deposes and says that he has read the foregoing petition for leave to intervene and knows the contents thereof and that the facts set out in the foregoing petition are true to the best of his knowledge and belief.

BURR TRACY ANSELL,

Burr Tracy Ansell.

Sworn to and subscribed before me this 10th day of July 1940.

[SEAL OF NOTARY]

MABEL C. GORMLEY,

Notary Public, D. C.

My commission expires 4/1/42.

CERTIFICATE OF SERVICE

DISTRICT OF COLUMBIA, ss:

A. B. Welsh, being first duly sworn, deposes and says that she is a secretary employed in the office of Bituminous Coal Producers Board for District No. 8, the petitioner for leave to intervene herein; that, upon direction of Burr Tracy Ansell, attorney for said Bituminous Coal Producers Board for District No. 8, directed to her through the Chairman of said Board, she has this day mailed one copy of the foregoing petition of Bituminous Coal Producers Board for District 8 for leave to intervene prepaid and registered to W. R. C. Coker and Jos. F. Johnston, attorneys for Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, 513 Seaboard Railway Building, Norfolk, Virginia, and one copy thereof to the Director, Bituminous Coal Division, Department of the Interior, Walker Building, Washington, D. C.

A. B. WELSH.

Sworn to and subscribed before me this 10th day of July 1940.

[SEAL OF NOTARY]

MABEL C. GORMLEY,

Notary Public, D. C.

My commission expires 4/1/42.

Notice of petition to intervene

Filed July 12, 1940

[Style of Court and title omitted.]

Please take notice that the Petition of Bituminous Coal Producers Board for District No. 8 filed herein July 11, 1940 with the Clerk at Richmond, Virginia, a copy of which was addressed to you July 10, 1940, by United States Mail, prepaid and registered, will be brought to the attention of the Court on Thursday, July 18, 1940, at its session assigned for that day in Baltimore, Maryland, at 10:00 o'clock A. M. or as soon thereafter as counsel may be heard prior to the argument herein now set for that day.

BURR TRACY ANSELL,

*Attorney for Bituminous Coal Producers Board for
District No. 8.*

CERTIFICATE OF SERVICE

DISTRICT OF COLUMBIA, ss:

M. A. Hayden, being first duly sworn, deposes and says that she is secretary to Burr Tracy Ansell, attorney for Bituminous Coal Producers Board for District No. 8; that, upon direction of

the said Burr Tracy Ansell, she has this day mailed one copy of the foregoing Notice of Hearing prepaid and registered to W. R. C. Cocke and Jos. F. Johnston, attorneys for Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of Seaboard Air Line Railway Company, 513 Seaboard Railway Building, Norfolk, Virginia, and one copy thereof to the Director, Bituminous Coal Division, Department of the Interior, Walker Building, Washington, D. C.

M. A. HAYDEN.

M. A. Hayden.

Sworn to and subscribed before me this 11th day of July 1940.

[SEAL OF NOTARY]

MABEL C. GORMLEY,

Mabel C. Gormley,

Notary Public, D. C.

My Commission expires April 1, 1942.

Same day, to wit, July 12, 1940, brief on behalf of petitioners is filed.

Same day, 25 printed copies of appendix to petitioners' brief are filed.

July 15, 1940, brief on behalf of respondents is filed.

Response of petitioners to petition for leave to intervene

Filed July 17, 1940

[Style of Court and title omitted.]

Petitioners submit that the Court should deny the petition of Bituminous Coal Producers Board for District No. 8 for leave to intervene herein as a party respondent for the purpose of urging the affirmance of the order sought to be reviewed.

The District Board is fully and adequately represented before this Court by the Director who can interpose every contention that the District Board could make. The duties imposed upon the District Board by the Bituminous Coal Act have been performed and carried out with full knowledge that the Receivers' coal was exempt from regulation under Section 4 of the Bituminous Coal Act since the filing of the Receivers' application for exemption in 1937 and could not be considered in any determination as to prices. It is our understanding that during the period between 1937 and the date of the Director's order the District Board prepared its weighted average of costs and proposed minimum prices for bituminous coal produced in the territory within the jurisdiction of the District Board to the Director for his approval without reference to the coal mined for the petitioners, and a decision of this Court reversing the order of the Director will not therefore affect

or change the status of the District Board as it has existed since the Receivers' application for exemption became effective.

There is no obligation or duty upon the District Board to determine who is the producer of coal subject to the Bituminous Coal Act or whether the coal here involved is not subject to Section 4 of the Act, such duty being upon the Director who is before this Court actively fulfilling his duty in the premises. The District Board has no right to intervene by virtue of the provisions of Section 6 (b) of the Bituminous Coal Act of 1937 because it is not a party within the meaning of that Section, and the intervention of the District Board, if granted as prayed for, will merely hinder and delay this proceeding. If the District Board is permitted to intervene, to interpose contentions and file briefs, it will be necessary for the Receivers to obtain time to reply thereto, and will require them to expend money in the preparation and filing of reply briefs.

The District Board is in a sense a part of the Director's organization. It is merely a part of the governmental machinery set up to administer the Act, and the administration is fully and adequately represented here by the Director. The District Board is in no sense a separately interested party within the meaning of Section 6 (b) of the Act, which provides for appeals by such parties, and, a fortiori, it has not any separate interest which would warrant intervention as appellee or respondent. Since the District Board has no function to perform in connection with this appeal the only possible motive for its attempt to interfere must be found in a desire to drive the Receivers out of captive production and into the general market.

Respectfully submitted,

W. R. C. COCKE,
JOS. F. JOHNSTON,
Attorneys for Receivers.

Dated July 16, 1940, Norfolk, Virginia.

Argument on petition for leave to intervene

July 18, 1940 (June term, 1940), cause came on to be heard on the petition of Bituminous Coal Producers Board for District No. 8 for leave to intervene, before Parker, Soper, and Dobie, Circuit Judges, and was argued by counsel and submitted.

Order granting leave to intervene

Filed and Entered July 18, 1940

[Style of Court and title omitted.]

On consideration of the Petition of Bituminous Coal Producers Board for District No. 8 for Leave to Intervene herein and the

argument of counsel thereupon had as well in support of as against the same:

It is now here ordered by this Court that the said Bituminous Coal Producers Board for District No. 8 be, and it is hereby, granted Leave to Intervene herein and is made a party respondent in this cause, and it is also granted leave to file a brief herein.

July 18, 1940.

JOHN J. PARKER,
Senior Circuit Judge.

Same day, to wit, July 18, 1940, brief on behalf of intervenor is filed.

Argument of cause on merits

July 18, 1940 (June term, 1940), cause came on to be heard on the merits before PARKER, SOPER, and DOBIE, Circuit Judges, and was argued by counsel and submitted.

July 24, 1940, reply brief of petitioners to brief of intervenor is filed.

July 25, 1940, the appearance of Burr Tracy Ansell is entered for the respondent Bituminous Coal Producers Board for District No. 8, Intervenor.

Opinion

Filed September 26, 1940

United States Circuit Court of Appeals, Fourth Circuit

No. 4671

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF
SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF
THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS
SECRETARY OF THE INTERIOR, AND BITUMINOUS COAL PRODUCERS
BOARD FOR DISTRICT NO. 8, INTERVENOR, RESPONDENTS

On Petition to Review an Order of the Director of the Bituminous
Coal Division of the Department of the Interior

(Argued July 18, 1940. Decided September 26, 1940)

Before PARKER, SOPER, and DOBIE, Circuit Judges.

W. R. C. Cocke and Joseph F. Johnston (L. B. Plummer and
Wm. H. Delaney on brief) for Petitioners, and Arnold Levy,

Assistant General Counsel, Bituminous Coal Division, Department of the Interior (Abe Fortas, General Counsel; Harold Leventhal and Robert W. Greenleaf, Attorneys, Bituminous Coal Division, Department of the Interior, and Robert L. Stern, Special Assistant to the Attorney General, on brief), for Respondents H. A. Gray and Harold L. Ickes; and Burr Tracy Ansell and William A. Grimes on brief for Bituminous Coal Producers Board for District No. 8, Intervenor, Respondent.

PARKER, Circuit Judge:

This is a petition to review an order of the Director of the Bituminous Coal Division of the Department of the Interior. Petitioners are receivers of the Seaboard Air Line Railway Company and as such are the holders of coal leases on certain coal lands in Virginia and West Virginia from which they are having coal mined in three separate mines by independent contractors. The coal thus mined is used by petitioners in the operation of the interstate railway system of which they are receivers and before being used is transported in interstate commerce. The receivers, as producers of coal, filed application under Sec. 4A of the Bituminous Coal Act, asking that they be held exempt from the provisions of Sec. 4 of the Act by reason of the exemption contained in subsection (1) thereof, to the effect that the provisions of Sec. 4 "shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." The order of the Director denied this application, and the receivers have filed with this Court petition for review under Secs. 4A and 6 (b) of the Act. Bituminous Coal Producers Board for District No. 8, a district board of coal members created under Sec. 4, Part I (a) of the Act, has intervened in support of the order of the Director.

There is no question as to the facts of the case, which were fully found by the Director. Briefly stated, they are as follows: Petitioners consume about a million tons of coal annually in their railroad operations. In 1934 they devised a plan for acquiring a portion of this coal at prices less than the minimum prices in effect under the National Industrial Recovery Act, by acquiring coal leases and securing the services of independent contractors to mine for them coal covered by the leases. This plan was submitted to the N. R. A. authorities and was approved by them as contravening no provision of the law. In 1934 and 1935, petitioners put the plan into effect by leasing the exclusive right to extract coal from mines on three coal tracts upon payment of tonnage royalties, with provision for payment of minimum royalties in any event. In one of the leases, but not in the others, they agreed to pay the property taxes on the coal properties. The leases were on an annual basis, with option on the part of peti-

tioners to renew from year to year, and with the right to terminate them upon termination of contracts with the contractors, who were to mine the coal, for breach or default on the part of these contractors. The leases have been renewed from time to time, two of the renewals, however, being for short periods when it was thought that the price of coal might be affected by the outcome of cases pending in the Supreme Court or the enactment of legislation under consideration by Congress. One of the provisions of the leases was that the owners of the leased mines should lease the mining machinery in the mines to contractors to be designated by petitioners to conduct mining operations for them; and this agreement was duly carried out and the mining machinery leased in accordance with the agreement.

Contemporaneously with the acquirement of the coal leases, petitioners entered into contracts with independent contractors for the mining of the coal subject to the terms of the leases. Under these contracts, a flat sum per ton was to be paid for the mining of the coal, with provision for adjustment to conform to changes in cost of operation due to fluctuation of wages, taxes, and certain other costs, and with option on the part of the petitioners to pay on the basis of actual cost plus 10 cents per ton. The contracts provided that the relationship of the contractors to petitioners should be that of independent contractors. Specifically, the contractors agreed to perform at their own expense all the work of mining and loading, including the furnishing of material and supplies and the necessary organization for the work of mining; to assume all obligations of petitioners to lessors, except those relating to royalties, minimum royalties and land taxes, and to indemnify petitioners against any of the liabilities assumed in the leases, with the same exceptions; to pay all taxes on improvements on the land and on all the property except the land; at their own expense to take out and maintain employers' liability, casualty and other insurance for the protection of petitioners and themselves; to pay all cost and expenses incident to the mining operations and save petitioners harmless from accidents incident thereto; and to assume liability for and save petitioners harmless from loss incident to injury to person or damage to property arising out of mining operations, taxes other than land taxes, fines imposed for violation of law by contractors or their workmen, liens for work or supplies, and attorneys' fees arising in connection with any of these matters. These contracts are terminable by petitioners if they are able to purchase coal on the open market at a price less than the amount paid the contractors plus the amount paid the lessors, and if the contractors fail to reduce their charge to an extent that will either meet or undercut the market prices. In the case of one of the contracts

a similar provision requires the contractor to absorb any increased cost of transportation, insofar as this would result in a cost to petitioners above the market price.

Under these leases and contracts, petitioners have received between 40 and 50 percent of the coal required for their operations. The contractors receive monthly and weekly instructions from petitioners as to their requirements and as to destination points of coal shipments. The coal is required to meet certain specifications and is inspected at the mines by petitioners' inspectors. The contractors are paid for mining only with respect to coal meeting the specifications, and only such coal is shipped to petitioners. The coal from the West Virginia mines is ordinarily shipped to and consumed in the States of Virginia, North Carolina, and South Carolina; that from the Virginia mine, in the States of North Carolina, South Carolina, Georgia, and Florida.

In no case does the contractor have or claim any title or interest whatever in the coal in the mines, either before or after severance, and no sale or other transfer of title to any of the coal from the contractors to petitioners takes place at any time. Petitioners are entirely independent of the lessors and the contractors; and these, in turn, are entirely independent of the petitioners and of each other. There is nothing in the evidence to support any other conclusion than that the mines in question are "captive" mines, leased by petitioners and operated through the instrumentality of independent contractors.

The Director denied the exemption prayed by petitioners on the ground that they were not producers engaged in the business of mining coal within the meaning of the Act. This conclusion he based on the fact that the actual work of mining was done by the employees of the contractors and not the employees of petitioners, that the risks imposed by the coal leases or incident to the mining operations were assumed by the contractors and that petitioners had made no investment in coal bearing lands. He found at length the primary facts which we have summarized, and after giving his reasons as above indicated, stated his conclusion as follows:

"In view of these many important factors I am of the opinion that applicants are not a producer of coal within the contemplation and design of the Act. The work of coal mining is performed, paid for, and controlled by the contractors. They are paid a fixed sum per ton for coal of the specified quality which is accepted at the mine by applicants' inspectors. The transaction has the aspects of an ordinary commercial sale and, indeed, it appears that applicants stand in a position not materially different from that of any large consumer who dominates a small source of

supply or who has contracted for the total product of a given manufacturing enterprise or tract of land. In every real sense, with respect to the supply of coal obtained from these contractors, applicants have not become a 'producer' but have rather left their 'consumer' position and mobility unchanged."

If as a matter of fact petitioners are nothing more than mere purchasers of coal, as thus found by the Director, they are not subject to the Act at all; for it is producers of coal, and not consumers, who are subject to its provisions. If they are subject to the Act, it is because of their operation of the mines through the instrumentality of the independent contractors; and it would, indeed, be an anomalous situation, if because of this operation petitioners should be held to be producers for the purpose of bringing them within the provisions of the Act and not to be producers within the meaning of the clause exempting producers who consume their own product. Of course, the operator of a captive mine is not to be denied that status because he operates on a royalty basis rather than as owner; and we cannot see that his status is affected because he operates through an independent contractor rather than directly.

The primary purpose of the Bituminous Coal Act is to provide for the fixing of maximum and minimum prices for the sale of coal after it has been removed from the ground. It does not attempt to regulate wages, royalties, or any other element of the cost of production. As said by Mr. Justice Douglas in *Sunshine Anthracite Coal Co. v. Adkins* — U. S. —, 60 S. Ct. 907, 909, "Its aim is the stabilization of industry primarily through price fixing and the elimination of unfair competition." The mistake of the Director was due to considering various incidents of the process of production and ignoring the vital element of price regulation. There is manifestly nothing upon which price regulation can operate where no price is possible; and no price is possible where no sale can possibly take place and all that is involved is the mining of coal under contract for the owner.

Of course, in the application of the Act, the substance and not the form of transactions is determinative; and what is in reality a sale may not be camouflaged by calling it something else. Thus, the prices established under the Act could not be evaded by a contract agreeing to pay a certain part of the purchase price of coal as mining costs and the remainder as royalties. Here, however, there is nothing to justify the conclusion that the facts established by the record are not what they purport to be. Petitioners did not agree with the contractors to pay royalties to the owners, nor did they agree with the owners to pay mining costs to the contractors. They controlled the coal in place through leases from the owners; and the contractors were entitled to mine it only because they were

mining for petitioners. The petitioners were thus in absolute control of the situation. They did not pay the contractors for the coal, but for mining it. They did not acquire title to the coal from the contractors, but from the owners of the coal lands. So far as the passage of title and the absence of the determinative feature of sale is concerned, we do not see how the case can be distinguished from that of the captive mine in which coal rights are held under lease and the coal is extracted directly by the lessee. The extraction by an independent contractor working under contract with the lessee does not supply any of the elements of a sale or provide any sort of basis for price regulation.

We do not doubt the power of Congress to regulate interstate commerce in coal produced in captive mines; but Congress has not here attempted regulation with respect thereto. On the contrary, coal produced in such mines is excluded from regulation by the express language of Sec. 4 (1) which provides:

"(1) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

Coal from captive mines unquestionably affects the market; but it is not sold or purchased on the market and therefore does not enter into direct competition with coal which is so sold or purchased. The Senate Committee on Interstate Commerce, which had the Act under consideration prior to its passage, directed its attention to this specific matter; and there can be no question but that the Act was adopted with the clear understanding that coal from captive mines was excluded from regulation.¹ Of course, coal from captive mines is subject to the tax imposed by Sec. 3 (a) of the Act; but that has been paid and no question with regard thereto is here involved.

¹ On the examination of Charles F. Hosford, Jr., Chairman of the former Coal Commission before the Senate Committee on Interstate Commerce, the following colloquy occurred (Hearings before Committee on Interstate Commerce, U. S. Senate, 2nd Session, 74th Congress, on S. 4668, June 3, 12, and 13, 1936, pp. 32 and 33):

"Senator MINTON. One other question. Do you take into consideration captive coal mines in the area in arriving at the weighted average?"

"Mr. Hosford. Inasmuch as captive coal does not affect the commercial market it has been disregarded, sir."

"Senator MINTON. And in this bill it is only considered for the purpose of the tax?"

"Mr. Hosford. Yes, sir."

"Senator DAVIS. What percentage of the coal produced now is consumed by rail roads?"

"Mr. Hosford. Approximately 25 percent."

"The CHAIRMAN. So that the operator that has a captive mine would have an advantage over his competitors, would he not, because he would get his coal for as low a price as he wants to?"

"Mr. Hosford. He always could do that, Senator."

"The CHAIRMAN. I say, he still can. The effect of it would be to raise the price, though, to the man who has not got a captive mine, would it not?"

"Mr. Hosford. You mean, the effect of this bill?"

"The CHAIRMAN. Yes; what you want to do is to raise the price of coal?"

"Mr. Hosford. Let us analyze it, Senator."

"The CHAIRMAN. Before you do that, let me ask you this: I suppose if this bill is going to be effective it is going to have a tendency to raise prices of coal where these people are cutting prices?"

We have no doubt but that petitioners are "producers" of coal within the meaning of Sec. 4 (1) above quoted, as well as other provisions of the Act. Respondents point to Sec. 17 (c) of the Act, which provides that "The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal." They argue that only the person, corporation, etc., that does the actual mining comes within the definition. We think that one who has the coal mined through the instrumentality of an independent contractor falls just as clearly within the definition. Qui facit per alium, facit per se. Certainly if these petitioners were selling the coal mined for them by the independent contractors, we would not hesitate to hold that they were subject to the code and price-fixing provisions of the Act; and on the same principle we must hold that, where they consume the coal thus produced, they are exempt from those provisions under Sec. 4 (1). For the purpose of the Act, we cannot see what difference it makes whether the owner of a mine digs the coal himself with his own organization or whether he has it dug for him by an independent contractor, who assumes the risks and responsibilities of that relationship. In either event, the owner causes the coal to be mined and prepared for use. He is the one by whom the first sale after production is made, if it is made. If he sells it, he should certainly be held subject to the regulatory provisions of the Act; and if he consumes instead of selling it, there is as much reason for exempting him from the regulatory provisions in the one case as in the other. To say, as does the Director, that petitioners do not pay the cost of mining the coal, is not correct. They pay the cost on a tonnage basis to the contractors. As well say that the builder of a house does not pay the cost of installing the plumbing because he contracts with an independent contractor to install it.

The Director says that "the basic purpose of this Act is to enable 'producers' to whom it applies to realize their weighted

Mr. HOSFORD. That is correct.

The CHAIRMAN. Consequently the man who has a captive mine can still get his coal more cheaply, but the man who has to buy it will not be able to get his coal cheaper, because you raise the price of coal to him; is not that correct?

Senator MINTON. The man who has a captive mine is not competing at all.

The CHAIRMAN. Yes, he is; he is competing in the industry.

Mr. HOSFORD. As I understand the language of this bill, the price provisions do not apply to captive coal at all.

Senator DAVIS. What percentage of the coal produced is captive coal?

Mr. HOSFORD. I would say approximately 10 percent; slightly over that. Senator Davis.

Senator NEELY. How much of that is consumed by the general public, what proportion of it and what proportion by the owners of the captive mines? In other words, to what extent does that captive coal compete with the other part of the mining industry?

Mr. HOSFORD. It does not compete directly, sir.

Senator NEELY. That is what I thought.

average cost of production." This, however, the Act attempts to accomplish by authorizing that maximum and minimum sales prices be fixed for producers; and this, we think, clearly indicates that the producers contemplated are those who either through themselves or through others prepare the coal for market and are in position to sell it. An independent contractor who merely mines coal for another cannot occupy this position because he has no power to sell. The owner or lessee of the coal who has had it mined by the independent contractor does occupy such position.

A case very much in point is *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, 7 Cir. 103 F. (2d) 124. In that case the coal was mined by the subsidiary of a railway company which owned the coal through another subsidiary. The railway consumed the coal produced. It was held that the coal was exempt from the provisions of the Act under Sec. 4 (1) whether the producing corporation was regarded as a separate entity from the railroad corporation or not. The Court said:

"In the instant situation, the trustees of the Railway Company could produce coal only by agents, and we discern nothing to preclude a corporation from being the agency thus utilized. We, therefore, are of the opinion that the coal involved in this proceeding was produced by the trustees by and through the agency of petitioner, and that it is consumed by the trustees in the operation of its railroad. Being both the producer and the consumer of the coal, it is entitled to the exemption provided in Sec. 4-11 (1) of the Act.

* * * * *

"That Congress intended to exclude from the requirements of Section 4 coal consumed by the producer is obvious, and we think it must be held that such exclusion is permissible whether the consumer produced the coal in its individual capacity or through the capacity of an agent. To hold otherwise is to countenance a situation in the instant matter which borders close to absurdity."

For the reasons stated, we are of opinion that the decision of the Director is not supported by substantial evidence and is based upon error of law. The order of the Director denying exemption to petitioners will accordingly be reversed and set aside, and the cause will be remanded to the Director for further proceedings not inconsistent herewith.

Reversed.

Decree

Filed and Entered September 26, 1940

United States Circuit Court of Appeals, Fourth Circuit

No. 4671

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF
SEABOARD AIR LINE RAILWAY COMPANY, PETITIONERS

vs.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF
THE DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS
SECRETARY OF THE INTERIOR, AND BITUMINOUS COAL PRODUCERS
BOARD FOR DISTRICT NO. 8, INTERVENOR, RESPONDENTS

On Petition to Review an Order of the Director of the Bituminous
Coal Division of the Department of the Interior

This cause came on to be heard upon the petition of Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, to review an order of the Bituminous Coal Division of the Department of the Interior, Docket No. 49-FD, denying their application for exemption under the provisions of the Bituminous Coal Act of 1937, and upon the transcript of record in said proceeding certified and filed in this Court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged, and decreed by the United States Circuit Court of Appeals for the Fourth Circuit, that the order of the Director of the Bituminous Coal Division of the Department of the Interior denying exemption to petitioners be, and the same is hereby, reversed and set aside; and that this cause be, and the same is hereby, remanded to the Director of the Bituminous Coal Division of the Department of the Interior for further proceedings not inconsistent with the opinion of the Court filed herein.

JOHN J. PARKER,

Senior Circuit Judge.

MORRIS A. SOPER,

U. S. Circuit Judge.

ARMISTEAD M. DOBIE,

U. S. Circuit Judge.

On another day, to wit, October 28, 1940, the mandate of this Court, in this cause, is issued and transmitted to H. A. Gray, Director of the Bituminous Coal Division of the Department of the Interior, at Washington, D. C., in due form.

Order authorizing clerk to use original transcript of record in making up record for use on application for writ of certiorari

Filed November 18, 1940

[Style of Court and title omitted.]

It appearing to the Court that the respondents in the above-entitled case have applied to the Clerk of this Court for a certified transcript of the record for use in the Supreme Court of the United States on an application for a writ of certiorari to this Court, and it further appearing that counsel for the respondents desire that the Clerk, in making up said transcript of the record, use the original transcript of the record filed in this Court in this cause,

It is now therefore ordered by this Court, that the Clerk of this Court, in making up the certified transcript of record for use in the Supreme Court of the United States on the application of the respondents for a writ of certiorari to this Court in this cause, be, and he is hereby, authorized to use and incorporate therein the original transcript of record filed in this Court, and add thereto copies of the proceedings in this Court in said cause. The said original transcript of record shall be returned to this Court after the case is finally disposed of in the Supreme Court.

November 18, 1940.

JOHN J. PARKER,
Senior Circuit Judge.

Clerk's certificate

UNITED STATES OF AMERICA.

Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the appendix to petitioners' brief, and of the proceedings in the said Circuit Court of Appeals in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals, and constitute and is a true transcript of the record and proceedings in the said Circuit Court of Appeals in said cause, made up in accordance with the directions of the Solicitor General of the United States, for use in the Supreme Court of the United States on an application for a writ of certiorari.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Baltimore, Maryland, this 22nd day of November A. D. 1940.

[SEAL]

CLAUDE M. DEAN,
*Clerk, U. S. Circuit Court of Appeals,
Fourth Circuit.*

In the Supreme Court of the United States

October Term, 1940

No. —

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE
DEPARTMENT OF THE INTERIOR, AND HAROLD L. ICKES, AS SECRETARY
OF THE INTERIOR, AND BITUMINOUS COAL PRODUCERS BOARD
FOR DISTRICT NO. 8, INTERVENOR, PETITIONERS

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF
SEABOARD AIR LINE RAILWAY COMPANY, RESPONDENTS

Stipulation as to record for use on petition for writ of certiorari

It is hereby stipulated and agreed by and between counsel for the respective parties that the record for use on the petition for certiorari filed in the above case shall consist of:

(1) The typewritten transcript of record before the Bituminous Coal Division as filed with the Clerk of the Circuit Court of Appeals for the Fourth Circuit.

(2) The printed Appendix to the brief for the petitioners in the Circuit Court of Appeals.

(3) The proceedings in the Circuit Court of Appeals.

It is further stipulated that, if the petition for certiorari be granted, the record shall be printed under the direction of the Clerk of the Supreme Court and shall consist of such portions of the transcript of proceedings before the Bituminous Coal Division and the record in the Circuit Court of Appeals as the parties shall stipulate, pursuant to Rule 38, Paragraph 8, of the Revised Rules of the Supreme Court.

FRANCIS BIDDLE,

Francis Biddle,

Solicitor General,

W. R. C. COCKE,

JOS. F. JOHNSTON,

Counsel for Respondents,

BURR TRACY ANSELL,

Burr Tracy Ansell,

Counsel for Intervenor,

Bituminous Coal Producers Board for District No. 8.

questions being reserved for future determination by the Court after hearing all parties in interest.

LUTHER B. WAY,
United States District Judge.

Dated at Norfolk, Virginia, July 31, 1934.

Approved:

TAEWELL TAYLOR,

W. R. C. COCIE,

HAROLD J. GALLAGHER,

Counsel for Receivers.

Entered and filed July 31, 1934. C. P. Breese, Jr., Deputy Clerk.

NOTE.—Copy of Application No. 146 and Order No. 146 entered thereupon identical with those here printed, with notice that they would be presented to the Court on July 31, 1934, at 9:30 o'clock A. M., or as soon thereafter as Counsel could be heard, were on July 30, 1934, served upon and receipt thereof acknowledged by the Solicitors of Record for the Bethlehem Steel Company, Seaboard Air Line Railway Company, Guaranty Trust Company of New York and Merrill P. Callaway, as Trustees, The New York Trust Company, and Mortimer N. Buckner, as Trustees, and The Continental Trust Company, as Trustees. In the interest of brevity said notice and receipts are not printed.

443 NATIONAL RECOVERY ADMINISTRATION

WASHINGTON, D. C.

In Reply Refer to—

MAY 4, 1934.

MR. HENRY W. ANDERSON,

Receiver, Seaboard Air Line Railway, Richmond, Virginia.

DEAR MR. ANDERSON: Acknowledging your letter of April 30th, this will serve as a confirmation of my telegram of April 28th, to which you referred, which read as follows:

"Have discussed with Mister Simpson your program for lease and operation of coal mine concerning which you left a memorandum and we see no objection from the standpoint of legal requirements or general purposes of N. R. A."

Very truly yours,

(S) DONALD R. RICHBERG,
General Counsel.

DRR:AH.

COPY OF WESTERN UNION TELEGRAM

APR. 28, 1934—11:46 A. M.

WB 222 36 Govt-Nr Washington D. C., 28, 1136A.

HENRY W. ANDERSON, *Receiver*.*Seaboard Air Line Railway, Rich.*

Have discussed with Mister Simpson your program for lease and operation of coal mine concerning which you left a memorandum and we see no objection from the standpoint of legal requirements or general purposes of N. R. A.

DONALD R. RICHBERG,

General Counsel.

PLAN

The leasehold interest of a coal company (which has ceased operations) in the coal and mine improvements and equipment has been divested and recaptured in attachment proceedings by the lessor corporation owning the land.

The Receivers would, under agreement renewable at the option of the Receivers from year to year for four years additional, lease from such landowner the right to extract from the mine a specified tonnage per year for their own use, with the further right to contract with an additional independent contractor (who has no title to the coal which the Receivers would have the right to take from the mine and no interest in such lessor corporation) for the work of extracting, mining, and loading the coal on railroad cars for shipment by the Receivers. The Receivers would pay the owning corporation the amount of taxes on the land and the same royalty per ton as paid under the former lease to such coal company.

The Receivers would contract for a period coextensive with the lease with an independent contractor who will have acquired by separate lease from such landowner the right to use, in the performance of the work of the contractor in so mining and loading the coal, the mine improvements and equipment of such owner.

The Receivers will pay such independent contractor for this work either a stipulated amount per ton based on cost of the work at prevailing prices labor, materials, etc., and inclusive of compensation to the Contractor (with provision for adjustment upward or downward as changes in such prices occur), or a stipulated amount per ton, based on such cost plus a fixed compensation of ten cents per ton to the Contractor.

The Contractor to spend \$25,000 in betterments or improvements to increase the capacity of the mine and lower production

costs, subject to the condition that the Receivers will reimburse him therefor to the extent of not more than \$10,000 at the end of the first contract period, but only in the event his contract with the Receivers is not renewed for an additional year or longer.

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UNITED STATES DEPARTMENT OF THE INTERIOR

NATIONAL BITUMINOUS COMMISSION, WASHINGTON

D49-FD

In the Matter of the Application of the RECEIVERS OF THE SEABOARD AIRLINE RAILWAY COMPANY FOR EXEMPTION FROM THE PROVISIONS OF SECTION 4 OF THE BITUMINOUS COAL ACT OF 1937

Report of the examiner

To the NATIONAL BITUMINOUS COAL COMMISSION:

STATEMENT OF THE CASE

This report concerns a hearing held on September 22, 1937, upon an application of a code member, the Receivers of the Seaboard Airline Railway Company, a corporation (hereinafter called Applicants), filed pursuant to the provisions of Section 4-A, seeking exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937 as to all coal mined and produced under certain separate lease and contract agreements relating to the mining of coal and the use of mining machinery, tipples and equipment located in Wise County, Virginia, and the counties of Mingo and Logan in West Virginia.

The Applicants entered into a lease on May 1, 1934, for a period of fourteen months, with an option for the extension and renewal thereof, which granted to them the sole and exclusive right to mine, extract and remove the coal for their own use from the leased lands in Mingo County, West Virginia; and on the same date entered into a written contract for the same

period of time and with a renewal option as contained in the lease with a party who had for that specific purpose leased or contracted for the use of certain mining machinery, tipples, and other equipment located upon the leased land and known as the "William-Ann" mine, necessary and essential for the mining and extracting of coal and the loading of such coal at the mine into railroad cars for transportation to the Applicants.

Subsequent to the consummation of the above-mentioned lease and contract and on the 10th and 12th days of July 1934, respectively, the Applicants entered into a similar contract and lease for the purpose of mining, extracting, and loading coal for

the sole use of Applicants, each for a period of one year with options to renew and extend, providing for the operation of a mine known as the "Glamorgan" mine located in Wise County, Virginia; and approximately one year later, on July 9, 1935, the Applicants accepted an offer of the Chilton Block Coal Company for a period of one year, with an option on behalf of the Applicants to renew the offer from year to year, which offer contemplated the execution and delivery of an "appropriate instrument of conveyance, assignment, and transfer" to take coal, during the period therein set forth, from the premises in Logan County, West Virginia, known as the "Chilton Block Coal Company No. 1 mine properties"; and on the same date entered into a contract with the same independent Contractor as in the case of the William-Ann mine above mentioned, providing for the necessary work and services in the operation of the mining machinery, tipples, and equipment situated upon the described premises, all for the purpose of mining, removing, and loading said coal for Applicants' use.

The Applicants' petition claims, basing such claim principally upon the leasehold ownership of the unmined coal in place at the mine and the production and mining thereof for the sole and exclusive use of the Applicants through the agency and instrumentality of the independent contractors (herein sometimes referred to as the "Contractor" or "Contractors"), at a price, in the amounts and under Applicants' control to the extent as set forth in the written leases and contracts, that all coal so mined and extracted from each and every of the three mines above referred to is produced, transported, and consumed by the Applicants and is, therefore, exempt under the specific provisions of Section 4 (1); Applicants also claim that said coal is exempt by virtue of the provisions of Section 4-A of the Act; that the provisions of Section 4 of the Act are violative and in contravention of the "commerce clause" and of the "due process clause" of the Constitution of the United States; and the Applicants, therefore, pray for an exemption from all of the provisions of Section 4 for all coal produced at the mines above named, and as to all transactions and commerce in said coal; and that the Commission authorize and direct that any and all assessments paid or other payments made by the Applicants prior to the effective date of the order of said Commission under or by virtue of any of the provisions of Section 4 of said Act, be refunded and repaid.

At the hearing on said application the Bituminous Coal Producers Board for District No. 8, by its attorney, filed its
 449 petition for leave to intervene in said proceedings, which petition for good cause shown on the face thereof was

granted by the examiner, and said District Board No. 8 was thereupon permitted to intervene in said proceedings and to be represented by its counsel.

APPLICATION—ASSIGNMENT OF HEARING—NOTICE

The Applicants filed their application on, to wit, the 21st day of August 1937, and thereupon the Commission fixed Monday, August 30, 1937, at the hour of 10 o'clock in the forenoon in a hearing room of the Commission at the Carlton Hotel in Washington D. C., as the time and place for a hearing thereon, and assigned and referred said application to an examiner for the purpose of conducting a hearing thereon and submitting his report and findings of fact, together with his recommendation to the Commission concerning the appropriate order or orders to be entered in the premises, which hearing for good cause shown was duly continued until on, to wit, the third day of September 1937, due and reasonable notice of an adjourned hearing on said application, to be held in a hearing room of the Commission at the Washington Hotel in Washington, D. C., on the 22nd day of September 1937, at the hour of 10 o'clock in the forenoon, was served upon all interested parties by mail, postage prepaid, including the Applicants, the Commissioner of Internal Revenue, the Consumers' Counsel, and District Board No. 8.

And now on this 22nd day of September 1937, in a hearing room of the Commission in the Washington Hotel, in Washington, D. C., the Commissioner of Internal Revenue having failed to appear in person or by his representative or attorney, and the Applicants by their attorneys, Consumers' Counsel, District Board No. 8, and other interested parties being present and having announced ready to proceed, this cause comes on for hearing upon the application as amended of the Receivers of the Seaboard Airline Railway Company, a corporation, and the intervening petition of District Board No. 8, and the Trial Examiner having heard the testimony of the witnesses, having examined the documentary evidence introduced in said cause and being fully advised in the premises, upon consideration of all the evidence finds that:

FINDINGS OF FACT

(A) The Applicants, Leigh R. Powell, Jr., and Henry W. Anderson, are the duly appointed and acting receivers of the Seaboard Airline Railway Company, a corporation, by virtue of an order of the United States District Court for the Eastern District of Virginia, entered therein on, to wit, the 23rd day of December 1930 (App. 1, Tr. 5).

1. The examiner further finds that the Railway Company was immediately and for a long time prior to the receivership operating under a consolidated charter granted by the states of Virginia, North Carolina, South Carolina, Georgia, and Florida, said Railway Company being the creature of various consolidations and mergers of transportation companies and corporations, some originally established well over one hundred years prior to this proceeding (Tr. 192-193); that prior to the receivership the Railway Company, and since said receivership the Applicants, have been operating said railway as a common carrier along the Atlantic Seaboard between and within the states above named and other states (Tr. 194-195); that during the year 1934 the Applicants entered into the various lease and contract agreements which concern the operation of three coal mines as summarily mentioned in the statement of the case and as hereinafter more specifically described.

WILLIAM-ANN MINE—LEASE

(B) 1. The examiner further finds that on the first day of May 1934, the Applicants entered into a lease for a period of fourteen months with the United Thacker Coal Company, a Maine corporation; H. Langdon Laws of Cincinnati, Ohio; Albert H. Cole of Peru, Indiana; and Charles W. Campbell of Pickaway, West Virginia, trustees (hereinafter called the "Cole and Crane Company" or "Coal and Crane Trustees," a real estate trust) as lessors (Ex. 2, Tr. 22, 23), which lease recited that the Applicants desired to obtain the sole and exclusive right to mine and extract coal "for their own use" from the lands of the lessors, and further desired to contract with an independent contractor for the work and service of mining and extracting the coal, provided the lessors would grant to the said independent contractor the right to use the mining machinery, tipples, and equipment owned by the lessors and necessary for the mining and extracting of coal from the leasehold, for a term coextensive with the lease of the coal rights to the Applicants, and which lease, among many and other varied provisions, after reserving the mining machinery, tipples, and equipment, conveyed to the Applicants for the above purposes the coal-bearing lands therein described for a period of fourteen months from and after the first day of May 1934, to the first day of July 1935, and also granted the sole and exclusive right to the Applicants to mine and remove the coal from the seam locally designated as the "Upper Thacker" vein. The lessors further agreed "simultaneously with the delivery of this lease" to enter into a contract leasing the mining machinery, tipples, and equipment located on

the leasehold with the person whom the Applicants desired to retain as an independent contractor for the purpose of operating said mine for a "period coextensive with the term or period of this lease," said contract to be renewable for a further period, or periods, as in said contract to be provided. In consideration of which covenants, the Applicants agreed to pay monthly as rent a royalty of 9 cents per net ton to be paid to the lessors on or before the 25th of the succeeding month. The lease further provides for the payment of a minimum annual royalty of \$16,200 and in no event less than \$10,000. The Applicants agree to pay all taxes and assessments and the quantity of coal mined is to be determined by the weights of the Norfolk and Western Railroad Company or, if shipped other than by land, the weights are to then be determined in some manner satisfactory to both the lessors and the Applicants. The lease also provides that, if in good standing and all the royalties are paid in full, the Applicants may elect to terminate the lease upon the expiration of 15 days' written notice in the event of a breach or default in the terms of the contract by the Contractor in actual operation of the mine. Finally, the lease provides that it may be renewed or extended from year to year at the option of the Applicants, but not excluding an aggregate period of four years upon designated written notice from and after the 30th day of June 1935, on the same terms and conditions as set forth in the original lease (Ex. 2).

2. The examiner further finds that the Applicants on the first day of May 1934, the same date as the consummation of the lease relating to the mine, entered into a contract with Daniel H. Pritchard, which contract was made expressly subject to the execution of the lease between the Applicants and the United Thacker Coal Company and Cole and Crane, Trustees (Ex. 5, Tr. 24). The contract, among other things, covenanted and agreed that the contractor was to acquire the privilege of using the mining machinery, tipples, and equipment located on the leasehold and necessary for the extracting of coal and loading the same into railroad cars for the Applicants' use, at his sole expense, the coal so extracted and mined to be loaded in certain specified quantities not less than a minimum number of net tons monthly. It was further provided for the cancellation of the contract at the option of the Applicants upon default on the part of the contractor or a breach of the provisions thereof, the principal pertinent provisions of the agreement between the Applicants and the contractor, insofar as the same applies to the things agreed to be done by the contractor, being as follows:

"The Contractor is, at his sole expense, to perform all service and work of every sort, character, and description, and is to furnish or provide all the labor, materials, supplies, machinery, equipment, appliances, and facilities, necessary or convenient for, or in and about, the performance of all of the service or work of so extracting, mining, manufacturing, transporting, and loading said coal. The Contractor will, at his sole expense, provide and at all times during the continuance of this agreement, maintain, manage, and conduct such organization as is necessary to the efficient and punctual performance by the Contractor of the service and work herein contracted for by him.

* * * * *

"The Contractor will assume and perform all obligations, liabilities, and duties of the Receivers to the Landowner which shall at any time accrue, exist, or arise under or by virtue of the agreement between the Receivers and the Landowner whereunder the Receivers will purchase or otherwise acquire the rights above mentioned (except the obligation of the Receivers under such agreement to pay to the Landowner the rental or royalty of 9c per ton and or the minimum royalty, if any, to be provided for in said agreement between the Receivers and the Landowner, and except taxes required under said agreement to be paid by the Receivers on the land and for which provision is hereinafter made), and the Contractor will at all times, and he does hereby (except as to said rental or royalty payments and said taxes) protect, indemnify, and save harmless the Receivers from and against, and or in respect of, all such obligations, liabilities, and duties so to accrue, exist, or arise.

"The Receivers will pay all taxes, assessments, and levies assessed on or against the land required to be paid by them thereon under said agreement between the Receivers and the Landowner. The Contractor hereby assumes and will 452
duly and punctually pay and discharge all taxes, assessments, and levies assessed on, against, or in respect of the improvements on said land and/or all other property or rights acquired by the Contractor under or by virtue of his said agreement with the Landowner, and or on, against or in respect of all property or rights, if any (other than on said land) granted the Receivers under said agreement between the Receivers and the Landowner, including privilege, license, and other taxes, if any, imposed or assessed against the Receivers.

"The Contractor will, at his sole expense, take out and maintain in full force and effect at all times during the continuance of this agreement, employer's liability, casualty, and such other insur-

ance as is customarily and under prudent and modern mining company practice carried by mining companies, which is not carried for the benefit of the Landowner, in each case, in the aggregate amount, with such insurance company or companies and under such forms of policies, as shall be approved by the Receivers, to the end that such insurance will adequately and fully protect the respective interests of the Receivers and the Contractor. The loss, if any, under such insurance policies shall be made payable to the Contractor and/or the Receivers, as their respective interests may appear, and the Contractor will, upon request of the Receivers, promptly furnish the Receivers with appropriate certificate or certificates, by the insurers that such insurance has been so taken out by the Contractor and is maintained in force as in this section hereof provided.

"The Contractor will duly and punctually pay all cost and expense of every sort, character, or description necessary to, in and about or incident or related to the service and work herein agreed to be performed by the Contractor, and the Contractor expressly assumes all risk of, agrees to at all times, and does hereby protect, indemnify, and save harmless the Receivers from and against, and in respect of, accidents, casualties, and all other risks incident to or in respect of the service and work herein contracted for.

"The Contractor further assumes all responsibility for and will at all times, and he does hereby, protect, indemnify, and save harmless the Receivers from and against, and in respect of:

"(a) All loss and expense incident to injury, fatal or otherwise, to persons, and/or damage to property, arising or growing in any manner, directly or indirectly, out of or in connection with (i) the service, work, or any other matter or thing contemplated under this agreement to be carried out, done, or performed by the Contractor; and/or (ii) entry by the Contractor, his agents, servants, employees, or representatives, or other persons, in said mine and/or his or their presence in, on, or in the vicinity of, and/or use, working, or occupancy of, said mine or premises, and/or the buildings, tipples, structures, equipment, machinery, appliances, and appurtenances, now or hereafter located in or on or near said mine or premises.

"(b) Subject to the provisions of Section 4 of this agreement, all taxes, assessments, and levies imposed by any Governmental authority or body on or in respect of said mine or premises, buildings, structures, equipment, machinery, appliances, and appurtenances, and/or on or in respect of the rights or privileges of either the Contractor or of the Receivers therein or with respect thereto, and/or the revenue, issues, or profits thereof.

"(c) All fines, penalties, and other loss which may result from the actual or alleged violation by the Contractor, his agents, servants, or employees, of any law, ordinance, or regulation of any public authority or body, and all liens, claims of other liability for or on account of work, labor, materials, or supplies for the service and work contemplated under this agreement.

"(d) The terms 'expense' and 'loss' as used in this section are intended and shall be construed to include attorneys' fees and costs, as well as all other expenses" (Ex. 5).

3. In consideration of the things to be done and performed by the contractor, the contract further provides that the Applicants will pay a flat sum per net ton of approximately \$1.35, subject to adjustment upward or downward on certain conditions subsequent to July 1, 1935, and upon fifteen days' notice after November 1, 1934, the Applicants may exercise their option to pay the actual cost plus 10¢ per ton price of all coal so mined and delivered to the Applicants.

4. The contract further specifically provides that the relationship of the contractor to the Applicants is solely that of an independent contractor, and as such the contractor shall be solely responsible for all of the actions, negligence, or omissions of himself and his agents (Ex. 5).

5. It is further found that pursuant to the recitals of intention contained in the above-described lease and contract agreements (Ex. 2, Ex. 5), the said Daniel H. Pritchard entered into a contract with the United Thacker Coal Company, the owner, providing for the use and operation by him individually of the mining machinery, tipples, and equipment located upon the said leasehold, for the uses and purposes contemplated and specifically described in and by said lease and contract agreements (Ex. 2, Tr. 22, 23; Ex. 5, Tr. 24, 43, 108).

6. It is further found that said lease and contract agreements have been supplemented, modified, and amended at various times and that said lease and contract have from time to time been continuously extended and renewed as so supplemented, modified, and amended (Ex. 2-5), and were in full force and effect at the time of the hearing on the application herein (Tr. 44), and were so extended and renewed under the last renewal and extension thereof until and including the 31st day of August 1938 (Tr. 44), with the right of the Applicants at their option to renew and extend said lease and contract for a further period of one year from and after their expiration, it being further found
454 that the original lease and contract provide for a final termination on June 30, 1939, without further options to extend or renew.

GLAMORGAN MINE—CONTRACT

(C) 1. The examiner further finds that on July 10, 1934, the Applicants, subject to the consummation of a lease between the Applicants and the Glamorgan Coal Land Corporation, owners of certain coal-bearing lands in Wise County, Virginia, entered into a written contract with the Glamorgan Coals, Incorporated, a Virginia corporation, owner of the mining machinery, tipples, and equipment located near and adjacent to the coal-bearing land that Applicants intended to lease from the Glamorgan Coal Land Corporation (Ex. 4, Tr. 24), which contract provided, among many and various other things, that the Glamorgan Coals, Incorporated, would furnish the work and service of mining the coal underlying said leasehold and of loading the same into railroad cars at the mine for the use of the Applicants, and was the same in all of its principal pertinent provisions, with certain exceptions as to production, price, dates, and the like (Tr. 50-51), as the contract between the Applicants and Pritchard regarding the operation of the William-Ann mine in Mingo County, West Virginia (Tr. 49).

2. Upon the breach of the terms of a lease between the Glamorgan Coal Land Corporation and the Glamorgan Coals, Incorporated, the land corporation foreclosed its lien, incorporated in said lease, against the Glamorgan Coals, Incorporated, and under said foreclosure sold certain surface rights and the mining machinery, tipples, and equipment formerly owned by the Glamorgan Coals, Incorporated (Tr. 52), and also the contract agreement by and between the Applicants and the Glamorgan Coals, Incorporated, dated July 10, 1934, which said contract agreement was, subsequent to said foreclosure sale, purchased by the Peerless Coal Corporation (Tr. 53, 150), a Virginia corporation, on August 23, 1937 (Tr. 151, 155), such sale and purchase being confirmed by decree of the Wise County, Virginia, Circuit Court on August 31, 1937.

GLAMORGAN MINE—LEASE

3. It is further found that on July 12, 1934, the Applicants entered into a lease agreement containing substantially the same principal pertinent provisions except as to quantities, prices, dates, and termination and cancellation, as the William-Ann mine lease, with the Glamorgan Coal Lands Corporation, owner of the coal-bearing lands therein described, located in Wise County, Virginia, and known as the Glamorgan Mine (Ex. 1, Tr. 22, 23, 48, 49), and that both the original contract and lease agreements were effective for a period of one year beginning July 17, 1934, with the right of the Applicants at their option to renew and

extend the lease and contract, upon designated notice, from year to year after July 17, 1935, for four successive years, not, however, exceeding an aggregate period of four years from and after the expiration date of the original lease and contract (Ex. 1).

4. It is further found that both the above-mentioned lease and contract agreements have been supplemented, modified, and amended at various times and that the same have been continuously extended from time to time and renewed as so supplemented, modified, and amended, and each such lease and contract was in full force and effect at the time of the hearing of 455 the application herein, and was so extended and renewed under the last renewal and extension thereof for a period of three years from and after July 17, 1935, upon the same terms and conditions as the original lease and contract, except as same were supplemented, modified, or amended, with the right of the Applicants at their option to renew and extend said contract and said lease for an additional period of one year from July 17, 1938, to July 17, 1939, unless the agreement with the Contractor should have been terminated prior to that time (Ex. 1).

CHILTON BLOCK NO. 1 MINE

Assignment of Right to Mine and Remove Coal

(D) 1. The examiner finds that on July 5, 1935, the Chilton Block Coal Company, lessee from the Dingess-Rum Coal Company of certain premises in Logan County, West Virginia, described as "known as the Chilton Block Coal Company No. 1 mine properties" offered (subject to Applicants' acceptance of an offer to said Applicants by Daniel H. Pritchard, dated April 5, 1935) to grant or cause to be granted to the Applicants the right and privilege to take from said mine during the period stated in said offer of said Daniel H. Pritchard, or any exception or renewal therein mentioned, the quantity of coal which said Pritchard offers to extract, mine, manufacture, transport, and load on railroad cars for the Applicants. Such offer further agrees to grant to said Pritchard, simultaneously and for a period coextensive with a grant to the Applicants, the right to employ and use, in the performance of his said work, the mining machinery, tipples and other equipment necessary and convenient for the performance of such work and services by the said Pritchard. This offer further provides for the payment by the Applicants in the event of its acceptance, of a rent or royalty of ten cents per net ton of the coal mined and transported under and by virtue of the terms of the Pritchard contract, and also agrees to execute and deliver to the Applicants an "appropriate instrument of con-

veyance, assignment and transfer * * * of the right and privilege" to mine and remove the coal as provided by the Pritchard contract, such instrument to contain as far as applicable and relating to said rights and privileges "the same terms, provisions, and conditions" as contained in the lease dated May 1, 1934, of the United Thacker Coal Company and Cole and Crane, Trustees, except that the Applicants are not to pay any taxes, levies or assessments against the lands comprised within said mine properties, and also provided that where the terms, provisions, and conditions of the above mentioned lease are inconsistent with the terms and provisions of the offer, the offer shall govern and control. The offer further contains a provision that the contemplated instrument of conveyance, assignment, and transfer should provide for a termination thereof by the Applicants simultaneously with the Applicants' termination of their agreement with the said Pritchard for the work and services to be performed by him, and finally agreed to cause to be executed and delivered to the Applicants the written consent and agreement of the owners and lessors (the Dingess-Rum Coal Company) of the mine property involved to the said conveyance, assignment and transfer and to the payment by the Applicants to the Chilton Block Coal Company of the rent or royalty (Ex. 3, Tr. 24).

2. It is further found that said offer was accepted on the face of said instrument by the Applicants on the 9th day of July 1935, subject to court approval or ratification (Ex. 3).

456 3. It is further found that on the 13th day of July 1935, the Dingess-Rum Coal Company agreed to the execution and delivery of an instrument of conveyance, assignment, and transfer, as mentioned and described in the offer of the Chilton Block Coal Company (Ex. 3).

4. It is further found that the Applicants on June 30, 1936, in a letter to the Chilton Block Coal Company, offered to extend and renew an agreement referred to as "the existing agreement under which you have (with the consent and agreement of the Dingess-Rum Coal Company, your former lessor) assigned and transferred to the undersigned the right to take coal from the premises * * *" for the period beginning on July 1, 1936, and ending on August 31, 1937, with an option on behalf of the Applicants to further renew and extend said agreement from year to year on and after August 31, 1937, upon certain designated written notice, not exceeding an aggregate period of three years thereafter, upon the same premises and conditions as contained in "the existing agreement," which offer further provided for the mining and removal of a minimum of 5,938 tons per month with such additional tonnage as the Applicants might elect to extract, mine, and remove. The offer further provides for a termination

of the "existing contract" simultaneously with the termination of the agreement hereinbefore mentioned, with Daniel H. Pritchard as contractor; and finally it provided that said offer is subject to and conditioned upon the extension and delivery to the Applicants of the written consent and agreement of the Dingess-Rum Coal Company to the extension and renewal as provided substantially in the original offer submitted to the Applicants. This offer of renewal and extension supplementing and modifying, as set forth, the above mentioned "existing agreement," was accepted by the Chilton Block Coal Company on the 30th day of June 1936, and on the same date the Dingess-Rum Coal Company, by a letter addressed to the Applicants, signified its consent and agreement to the extension and renewal as supplemented and modified (Ex. 5).

5. It is further found that on April 28, 1937, the Applicants referring to "the existing agreement under which you have (with the consent and agreement of the Dingess-Rum Coal Company, your former lessor) assigned and transferred to the undersigned the right to take coal from the premises and properties in Logan County, West Virginia, known as the Chilton Block Coal Company No. 1 mine properties," offered to extend and renew said agreement of assignment and transfer for the period beginning September 1, 1937, and ending August 31, 1938, with the right of the Applicants at their option to further renew and extend said agreement from year to year on and after August 31, 1938, not exceeding an aggregate period of two years upon certain designated written notice and upon the same terms and conditions as contained in said "existing agreement." This offer further supplemented, modified, or amended the offers in said present offer referred to as "an existing agreement" in that the minimum tonnage was increased to 6,876 tons of coal per month or such additional tonnage as the Applicants might elect to extract, mine, and remove; it contained substantially the same provision with reference to termination and with reference to the execution and delivery of a written consent by the Dingess-Rum Coal Company; it was duly accepted on the face thereof on April 28, 1937, by the Chilton Block Coal Company (Ex. 3).

6. It is further found that the Chilton Block Coal Company failed to execute and failed to deliver the "appropriate instrument of conveyance, assignment, and transfer" as contemplated by said original offer of the Chilton Block Coal Company to the Applicants (Tr. 60, 61); but that such contemplated
 457 "appropriate instrument" was to extend over a period of one year only, with option to extend and renew for further periods of one year (Ex. 5, Tr. 24); and that the Applicants went into possession under the accepted offer dated July 5, 1935.

and caused to be begun the process of mining the coal from the premises described in the offer, and caused the contractor to actually remove coal from said premises and load the same at the mine for the Applicants' use, into railroad cars (Tr. 55-56), all with the express written consent of the Dingess-Rum Coal Company (Tr. 55); and that said arrangements have been continuously in effect through renewal and extension agreements (Tr. 56).

CHILTON BLOCK NO. 1 CONTRACT

7. The examiner further finds that on July 5, 1935, Daniel H. Pritchard offered to enter into a contract (Ex. 6, Tr. 25) with the Applicants, subject to the acquisition by the Applicants through assignment of said lease or other instrument, or transfer of the right to mine and remove coal from the property known as the Chilton Block Coal Company No. 1 mine properties, located in Logan County, West Virginia, "as an independent contractor," at his sole expense, to mine said coal and to load the same on railway cars for shipment, according to the specifications of the Applicants, for a flat sum of \$1.15 per net ton, subject, however, to upward or downward price adjustment dependent upon fluctuation in wages or unit prices over which he exercised no control, and further offering Applicants the right after March 1, 1936, to adopt the alternate price of cost plus ten cents per ton; said offer further provided that Pritchard was to purchase or otherwise acquire the mining machinery, tipples, and equipment located on the property known as the Chilton Block Coal Company No. 1 mine properties, necessary for the mining and loading of the coal, and further proposed to enter into a formal specific agreement, upon acceptance of this offer by the Applicants, embodying practically the same principal pertinent terms and conditions, with some few exceptions, as provided by the contract dated May 1, 1934, between Pritchard and the Applicants with relation to the operation of the William-Ann mine. The offer further agrees to indemnify the Applicants against loss through the negligence or omission of Pritchard and his agents, and provides for a termination on sixty days' notice in the event that coal of the same grade and quality can be purchased in the same field at a total cost per ton less than "the amount per ton at the time payable by you (the Applicants) to the undersigned for said work and services, plus rent and royalty," unless Pritchard agrees in writing to reduce his cost to an amount equal to, or less than, such other coal (Ex. 6).

8. This offer was accepted by the Applicants on July 9, 1935 (Ex. 6).

9. It is further found that on June 30, 1936, the Applicants, referring to the agreement immediately above mentioned, by which Pritchard agreed to perform work and services for the Applicants in the mining and loading of coal at the Chilton Block Coal Company Mine No. 1, offered to extend and renew the same from June 30, 1936, to August 31, 1937, and further provided for renewal from year to year, not exceeding an aggregate period of three years from and after August 31, 1937, upon certain designated written notice, said offer incorporating certain supplements, modifications, or amendments of the original agreement between the Applicants and Pritchard as to minimum and maximum tonnages, price, and the specifications, size, and grade of coal to be extracted and loaded. This letter-offer was accepted by Pritchard on the 30th day of June 1936 (Ex. 6.)

458 10. It is further found that on the 28th day of April 1937, Pritchard offered, by a letter to the Applicants, to extend and renew the agreement as extended and modified from and after August 31, 1937, to September 1, 1938, which offer further modified, supplemented or amended the original agreement relative to the maximum and minimum quantities of coal to be produced, made certain price changes, and provided for upward or downward price adjustment and for termination of the agreement in the event that coal of the same grade and specifications could be purchased in the same coal field at a total per ton cost, less than the coal so purchased from Pritchard, unless Pritchard agreed to meet such competition. It finally provided for a two-year renewal subsequent to August 31, 1938, upon the same terms and conditions as the former. This letter-offer was accepted by the Applicants on April 28, 1937 (Ex. 6).

11. It is further found that on May 25, 1937, by a letter-offer of that date, the Applicants agreed to accept membership in the National Bituminous Coal Code under the Act of 1937 (Ex. 5), and "as and to the extent of their liability for the excise tax of one cent per ton levied under Section 3-A of said Act and for the assessment levied under Section 4-B of said Act, pay said taxes and assessments referable to coal produced at said mine." The offer further provides that if Pritchard should legally have to pay said excise tax and assessment levied under Section 4-B that same shall constitute increased elements of cost. This offer was accepted by Pritchard on the face thereof on the 27th day of May 1937 (Ex. 5).

12. It is further found that the agreements relating both to the mining and removal of the coal and operation of the mining

machinery, tipples, and equipment, have been supplemented, modified, and amended and that each such agreement between the Applicants and the Chilton Block Coal Company, and the Applicants and Daniel H. Pritchard, was in full force and effect at the time of the hearing of the Application herein, both having been extended and renewed for further periods, with options for the further renewal of the same (Ex. 1, 2, 3, 4, 5, 6).

GENERAL FINDINGS OF FACT

1. The examiner finds that the United Thacker Coal Company is a corporation organized under the laws of the state of Maine, and is doing business in the state of West Virginia (Tr. 110); that the Glamorgan Coal Land Corporation and the Peerless Coal Corporation are corporations organized under the laws of the state of Virginia (Tr. 111-112); that the Chilton Block Coal Company and the Dingess-Rum Coal Company are corporations organized under the laws of the state of West Virginia (Tr. 112-113); that Cole and Crane, Trustees, is a real estate trust, the original trustees (Tr. 122-123) of which were R. Langdon Laws of Cincinnati, Ohio; Albert H. Cole of Peru, Indiana; and Charles W. Campbell of Pickaway, West Virginia (Ex. 2 and 3).

2. It is further found that all of the coal mined for the Applicants under the lease and contract agreements herein, is consumed by the Applicants, excepting a small portion thereof sold to and consumed by the employees of the contractors (Tr. 62, 63, 215); that the Applicants have, in and by their said several leases, contracts, offers, acceptances, and extensions and renewals thereof, as amended, modified, and supplemented (Ex. 1, 2, 3, 4, 5, 6), provided for the mining, extracting, and loading into railroad cars a minimum tonnage from the William-Ann mine of 180,000 tons annually, at a minimum royalty of \$10,000; a minimum tonnage from the Glamorgan mine of 120,000 tons annually, at a minimum royalty of \$9,000; and a minimum tonnage from the Chilton Block No. 1 mine of 180,000 tons annually, at a minimum royalty of \$10,000; that the Applicants used and consumed during the year 1936 approximately 1,000,000 tons of coal (Tr. 224), of which said tonnage approximately 40% to 50% was supplied by the William-Ann, Glamorgan, and Chilton Block No. 1 mines (Tr. 207).

3. It is further found that Daniel H. Pritchard and the Peerless Coal Corporation are independent contractors (Ex. 2, 12th par. Sec. 2, and Sec. 12, and Ex. 4, 6), and are not under the control or management of the Applicants in the mining and the removing and loading of said coal in the railroad cars as long as

coal is produced and loaded safely and efficiently in the amount as required by the monthly and weekly tonnage instructions issued to the contractors by the Applicants; that said contractors, individually and apart from the control or management of said Applicants, pay the operating expenses of the said various mines, including maintenance and repair charges, pay rolls, personal property taxes levied and assessed against the mining machinery, tipples and equipment, and Social Security taxes; and, independent of said Applicants, said contractors employ and discharge their said employees and arrange for the payment of workmen's compensation awards through the insurance carrier.

4. It is further found that the Peerless Coal Corporation and Daniel H. Pritchard, the contractors, ship the coal mined by them at the three mines above mentioned, when loaded, from the mine (Tr. 215) to the Applicants at junction points along the railway operated by the Applicants; the Applicants are then advised through the contractors by wire as to the number of cars shipped, which wire is later confirmed by letter, including the individual car numbers of the cars so shipped (Tr. 215-216); that each of the mines involved is located upon railroad tracks other than the tracks of the Applicants and moves over and upon such lines of railway on regular revenue billing (Tr. 216) until such cars reach the junction points upon the lines of track operated by the Applicants; that the William-Ann mine is located on the tracks of the Norfolk & Western railroad, and the coal from such mine is transported over such railroad and delivered to the Applicants on regular revenue billing at their cost, at Petersburg and Durham, North Carolina, where the coal is forwarded on Applicants' company way-bill to Ryan and Hartman, Virginia, and Coolan and Gibson, North Carolina (Tr. 201, 218); that the Glamorgan mine is located on the tracks of the Interstate Railroad Company, and the coal from such mine is transported over such railroad on regular revenue billing at Applicants' cost, and delivered to the Clinchfield Railroad Company at Miller Yard, Virginia, which railroad transports the coal on regular revenue billing, and delivers the coal to the Applicants at Bostick, North Carolina, where said coal is forwarded on Applicants' company way-bill to Wiggins, South Carolina, and occasionally Stubbs, North Carolina (Tr. 202, 218); that the Chilton Block Mine No. 1 is located on the tracks of the C. & O. Railroad Company, and the coal from such mine is transported on regular revenue billing at

Applicants' cost, and delivered to the Applicants at Richmond, Virginia, from which place said coal is forwarded on

Applicants' company way-bill to Apex, North Carolina (Tr. 202, 217).

5. It is further found that coal from the William-Ann and Chilton Block No. 1 mines located in West Virginia, is ordinarily transported into and consumed in and between the states of Virginia and North and South Carolina; and coal from the Glamorgan mine located in Virginia is ordinarily transported into and consumed in and between the states of North and South Carolina, Georgia and Florida (Tr. 225).

CONCLUSION

The Applicants filed their petition for exemption from the provisions of Section 4 pursuant, as specifically stated therein, to the provisions of Section 4-A, the second paragraph of which Section, among other things, provides that:

"Any producer believing that any commerce in coal is not subject to the provisions of Section 4 or to the provisions of the first paragraph of this Section, may file with the Commission an application * * * for exemption, setting forth the facts upon which such claim is based."

By simple and unequivocal language this Section, under which Applicants' petition is filed, authorizes the filing of an application for exemption by a "producer." It does not appear, from a careful reading of this entire section, that its language authorizes any one other than a "producer" to claim exemption under its particular provisions.

The Applicants in their petition claim exemption for (a) the Seaboard Airline Railway Company, and (b) "the coal produced at each of said three mines" involved, and (c) "the transactions and commerce in said coal"; they claim that they own the exclusive right to extract and mine the coal underlying the premises described in the various lease and contract arrangements; that in each case the coal is "owned by" and is the "property of Applicants"; that Applicants are the "producers" at each mine, and that since they transport and consume such coal, that (a) "Applicants," (b) the "said coal produced at each of said three mines," and (c) "the transactions and commerce in said coal" are specifically exempted from Section 4 under the provisions of Subsection 4 (1), which provides that:

"The provisions of this Section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

In support of and as further claim for exemption from Section 4 as to the Applicants, the coal produced and the transactions and commerce in said coal, it is contended that such Section "relates and applies only to coal which is sold or the title to which

is otherwise transferred" and to "transactions and commerce in coal which involves the sale or other transfer of title * * *."

461 Finally, it is contended that Section 4 is violative and in contravention of the commerce and due process clauses of the Constitution.

Applicants' right to exemption under both or either of the Sections of the statute upon which they base their claim in the instant petition, seems to be largely governed by the interpretation of the term "producer" as used in Section 4-A and Subsection 4 (1).

The Applicants urge that they are in fact "producers," and that the operators who mine, extract, and load the coal in railroad cars at the mine are their agents and the instrumentality through which they produce the coal. They claim to be receivers "engaged in the business of mining coal" and within the definition of the term "producer," as set forth in Subsection 17-c. This Subsection defines a "producer" generally as one "engaged in the business of mining coal." Upon inquiry through cross-examination at the hearing concerning their right to engage in the business of mining coal in West Virginia, Applicants, through counsel, claimed that the receivers had been granted that right by express court order.

"Mr. HARRINGTON. Mr. Plummer, could you tell us whether or not the Seaboard Airline Company is authorized to mine coal in West Virginia, under their charter?"

"Mr. PLUMMER. Seaboard is authorized under its charter, of course, to conduct and operate railroads and to perform any incidental duties, and aside from that the Seaboard was authorized by a specific court order to enter into these contracts (Tr. 170).

"Mr. HARRINGTON. In deference to the receivers of the Seaboard Airline, what right have they to mine coal in West Virginia?"

"Mr. PLUMMER. The receivers have been granted that right by express court order" (Tr. 171).

In their brief, Applicants claim that this question cannot be raised in this proceeding, as it amounts to a collateral attack on their charter powers. The law relative to collateral attack is conceded; however, it is unquestionably a proper matter for the Commission to inquire into whether or not the Railway was ever licensed to engage in the business of mining coal in West Virginia, as throwing light upon the conception of the Railway's status in this particular regard as held prior to this hearing by its executive officers. The record is silent on this most important point, except as to counsel's claim that Applicants have the right to engage in business in West Virginia by express court order. This contention may be disposed of by the statement that if the

corporate entity were actually engaged in doing business in West Virginia, a state foreign to its residence, and had failed to procure a license therefor, then the mere approval by a Federal Court located in Virginia of contracts and leases, as in the present case, would not imply and could not legally directly provide that the Railway or the Receivers, in the absence of a state license, might engage in the business of mining coal in the state of West Virginia.

If the coal from the William-Ann and Chilton Block No. 1 mines is being produced by Daniel H. Pritchard as an independent contractor, the Applicants are not required to procure a state license to mine the coal. However, if they directly engage in such activities, a state license is required. Apparently there is no such license, else it would have been adduced at the hearing in aid of Applicants' present contention; and it is, therefore, reasonable to believe that Applicants consider that they are producers for the purpose of this hearing, but that the independent contractor is the producer, so far as license requirements of West Virginia are concerned.

Furthermore, the construction advocated by the Applicants does not seem to be that which was intended by the Congress, or the construction indicated by the rules of legal interpretation, or the construction applied by this Commission to facts fundamentally similar.

The objective, of course, of the Applicants in establishing themselves as a "producer," is to relieve from the regulation and control of the Act, the coal mined and disposed of since the effective date of the present Act, and the potential future tonnage produced under the instant or similar lease and contract arrangements, which could equal, in this one instance alone, the total annual needs of the Applicants, amounting to nearly 1,000,000 tons in 1936. No such wholesale exemption was intended or expressed by the statute.

Congress intended to regulate not only the sale or other disposal, but also the distribution of bituminous coal in interstate commerce, and in intrastate commerce where such sale or other disposal and such distribution was found by the Commission to directly affect interstate commerce, and Congress provided for the control of matters and transactions directly affecting interstate commerce in such coal and transactions in coal in intrastate commerce in any manner directly affecting interstate commerce. Insofar, therefore, as possible, the Congressional intent was to regulate bituminous coal through the sale, and the disposal, and the distribution, and through matters and transactions relative thereto, to the furthest reaches of its jurisdictional limits. With this thought in view, Congress delegated the power and author-

ity vested in it to this Commission. To interpret the plenary powers delegated by the Act in such a manner as to permit wholesale evasion through the media of short leasehold purchases and the consummation of contracts providing for the work and service of mining, extracting, and loading the coal, would be tantamount to imputing either Congressional negligence or bad faith, for if, through the use of such methods and contrivances, a few tons of coal can be mined, disposed of, distributed and consumed, then there is no prohibition in the Act directed toward the regulation or control of the potential tonnage of every idle mine whose coal may be leased to a consumer and may be extracted by a third party for the consumer's sole and exclusive use. In view of the number of idle mines readily available for use and the relative ease with which an evasive arrangement may be established, it must be considered that Congress contemplated such a practice and intended to forestall it. Certainly, it could not have intended that such a vast potential tonnage should, when mined and disposed of, be unregulated and exempt from the Act.

463 The courts have often held that it is the intent of a statute that is the law, that the intent is the vital part, and the primary rule of construction is to ascertain and give effect to that intent (*Atkins vs. Disintegrating Co.*, 18 Wall. 272, 301; *U. S. vs. Chase*, 135 U. S. 225; *McKee vs. U. S.*, 164 U. S. 287; *Hawaii vs. Mankieki*, 190 U. S. 190). In the case of *Manhattan vs. Kalkenberg*, 165 N. Y. 1, 7, 58 N. E. 790, it was held that:

"In construing statutes the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

In statutory construction inquiry is usually directed to a particular provision, clause, or word as in the instant case. To answer such inquiry the word must be construed with reference to the purpose of the Act, and, as set forth in *Kent's Commentaries*,

"In the exposition of a statute the intention of the lawmaker will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are not explicit the intention is to be collected from the context, from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

Applying the reasoning of the above citations to the construction of the word "producer" as used in Subsection 4 (1) and Section 4-A of the Act, and in view of "the occasion and necessity of the law," the "mischief felt" and "the remedy in view," the

construction contended for by Applicant is a strained interpretation unwarranted by the phraseology and intent, and an unreasonable construction of the statute under legal principles of construction.

This Commission has heretofore interpreted the meaning of the exemption clauses as contained in Subsection (1) of Section 4, and in Section 4-A. In the matter of the Application of the Wheeling Steel Corporation, the Commission, upon facts fundamentally similar to the instant case, as far as the meaning of the word "producer" is concerned, stated in its opinion that:

"It is not the generally accepted rule of construction in the case of statutory exceptions or exemptions, to broaden or extend the exception or exemption by any liberal interpretation. Exceptions, as a general rule, should be strictly, but reasonably, construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provisions rather than the exception. Where a general rule is established by statute, with exceptions, the court will not curtail the former nor add to the latter by implication, and it is a general rule that an express exception excludes all others."

Cited in support of the above statement are the following: 59 Corpus Juris, 1092; Lewis' Sutherland on Statutory Construction,

Sec. 494; Hopkins vs. U. S., 235 Fed 95. In such case the

464 Commission found in effect, as to two of the mines, that the subsidiary corporations which produced the coal and the parent corporation that consumed the coal were not exempt from the provisions of Section 4 (1) of the Act for the reason, that, in fact and in intent of the statute, the parent and its subsidiaries are separate and distinct corporations; ~~the~~ two subsidiaries were held to be the producers of the coal, whereas the parent was the consumer thereof. The intent of the Congress, the construction indicated by the rules dictating legal interpretation, and the construction as applied by this Commission upon facts fundamentally similar, as in the Wheeling case, in the opinion of your examiner all militate against the contention of the Applicants.

In consideration, therefore, of the conclusions hereinabove expressed, your examiner respectfully recommends that the application of the Receivers of the Seaboard Airline Railway Company be denied.

In the opinion of your examiner, under the views herein expressed, the Commission has no occasion upon this record to consider the other contentions of the Applicants, as set forth in their application and as urged in their brief, among them being the alleged unconstitutionality of Section 4 under the due process and commerce clauses if applied to them.

RECOMMENDATION

It is respectfully recommended that an appropriate order in harmony with the findings of fact and conclusions herein expressed, be entered in these premises to the effect that the Applicants are not the producer of the coal within the meaning and intent of Section 4-A, pursuant to which this application was filed, or within the meaning and intent of such term as used in Subsection 4 (1).

It is further recommended that said application, therefore, be denied.

Respectfully submitted.

T. B. CANTRELL, *Trial Examiner.*

Dated this 27th day of November 1937.

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UNITED STATES DEPARTMENT OF THE INTERIOR

NATIONAL BITUMINOUS COAL COMMISSION, WASHINGTON

D49-FD

In the matter of the application of the RECEIVERS OF THE SEABOARD AIRLINE RAILWAY COMPANY FOR EXEMPTION FROM THE PROVISIONS OF SECTION 4 OF THE BITUMINOUS COAL ACT OF 1937

Abstract of the evidence

At the hearing on the above application the Applicants identified Exhibits 1 and 2 (Tr. 23), Exhibits 3, 4, and 5 (Tr. 24), Exhibit 6 (Tr. 25), Exhibit 1 (a) (Tr. 26), Exhibit 1 (b) (Tr. 34), and Exhibit 7 (Tr. 267). All of said Exhibits were offered and received in evidence subject to objections offered by counsel for the Commission and intervenor (Tr. 30, 267), the same being all of the documentary evidence offered at said hearing.

In view of the evidence introduced to the effect that Peerless Coal Corporation, since the filing of the Receivers' application and before the hearing, had succeeded the Receivers of Glamorgan Coals, Inc., as the parties performing the work and service of extracting, mining, and loading the coal produced at the Glamorgan mine for the Receivers, the Applicants' petition was amended to show such successorship and to make relevant testimony with regard to the Peerless Coal Corporation and its operations (Tr. 185, 211, 212). District Board No. 8, on motion of its attorney, was granted leave to intervene in said proceedings (Tr. 4), and such intervening petition, as well as the petition for

the Applicants, was copied, upon motion of the respective attorneys, as a part of the record herein (Tr. 14, 19).

The Applicants called five witnesses in their behalf.

467 Frank R. Brittain, being first duly sworn, testified in substance as follows:

That he has been continuously employed by the Applicants as their contract clerk and custodian of records and contracts; that his duties consist of the examining, recording, indexing, and filing the contracts and records, and making and distributing abstracts of such contracts to the departments interested that as such custodian he has received for filing, abstracting, and recording respective instruments of conveyance to the Receivers of the coal in what is known as the "Glamorgan" mine, the "William-Ann" mine and the "Chilton Block No. 1" mine; that he has also, as such custodian, received for filing, abstracting, and recording contracts between the Receivers and the respective individuals or corporations having performed or now performing the work and service of extracting, mining, and loading the coal produced at the three above mentioned mines (Tr. 20, 21).

Thereupon, Applicants' Exhibit 2 was marked for identification, and identified by the witness as instruments of conveyance to the Applicants of the coal in the William-Ann mine (Tr. 21, 22, 23); Exhibit 1 was marked for identification, and identified by the witness as being instruments of conveyance to the Applicants of the coal in the Glamorgan mine (Tr. 21, 22); Exhibit 3 was marked for identification, and identified by the witness as instruments of conveyance to the Applicants of the coal in the Chilton Block No. 1 mine (Tr. 24).

The witness then identified certain papers handed to him by the attorney as contracts providing for the performance of the work and service of extracting, mining, and loading coal for the Receivers at the Glamorgan mine, which was designated Applicants' Exhibit No. 4 (Tr. 24); contracts providing for the work and service of extracting, mining, and loading coal for the Receivers at the William-Ann mine were identified by the witness as Exhibit No. 5 (Tr. 24); and papers designated as Applicants' Exhibit No. 6 were identified by the witness as a contract providing for the performance of work and service of extracting, mining, and loading of coal for the Receivers at the Chilton Block No. 1 mine (Tr. 25). Certain papers described by the attorney for the Applicants as part of such instrument of conveyance by which the Applicants acquired title to the coal at the William-Ann mine were marked for identification as Exhibit No. 1 (a) and identified by this witness. All Exhibits were accepted in evidence subject to objection of counsel (Tr. 27). An Exhibit marked for identification as Exhibit No.

1 (b) was then handed to the witness, who characterized it as an agreement by the Peerless Coal Corporation to assume obligations and perform the duties assumed by the Glamorgan Coals, Inc., under a contract between Glamorgan Coals and the Applicants, for mining and removing coal. This Exhibit was introduced and accepted in evidence (Tr. 33, 34).

The above constitutes, in the opinion of the examiner, all the relevant evidence offered by the witness relative or material to the issues in this case, and, thereupon, the Applicants called as a witness Mr. L. B. Plummer, who being first duly sworn, on his oath testified in substance as follows:

That he is the General Attorney for the Applicants, and is the member of the Law Department that is most intimately familiar with negotiations and the drafting of instruments relating
468 to the transactions that are the subject of this hearing (Tr. 38); that Exhibit 2 is the oldest of the transactions, has more of a background, is still in force, and relates to the leasing of the coal at the William-Ann mine (Tr. 39-40); that negotiations between the Applicants and the United Thacker Coal Company and Cole and Crane, Trustees, owners of the fee and of the plant, resulting in an arrangement under which the Applicants acquired the coal and the exclusive right and privilege to extract, mine, and produce for their account (Tr. 40, 41); that the purpose of the lease (included as one of the papers in Exhibit No. 2) is to convey to the Applicants the entire property interest of both grantors (Tr. 42); that the Applicants negotiated a contractual arrangement with Daniel H. Pritchard, an experienced coal operator, for the operation of the William-Ann mine in the extraction, mining, and loading of coal on railroad cars at the mine for shipment to the Receivers (Tr. 43, Ex. 5); that the lease and contract were for a period of one year, with privilege of renewal by the Applicants for successive yearly periods, the duration of the grant and of the contract being coextensive in time (Tr. 43). Since 1934 each had been successively renewed (Tr. 43, 44), and has been continuously in effect since 1934, are now in effect and continue in effect until October 1, 1938 (Tr. 44). The renewals have been subject to changes in tonnage, and some adjustment of the compensation of contractor (Tr. 44); that the Applicants issue instructions each month to the operator, indicating the amount of tonnage required for their next succeeding month, these instructions being followed by weekly instructions; royalties are paid by the Applicants directly to or for the account of the land owners (Tr. 45). The operator or contractor is compensated on a flat sum per ton basis of coal produced at the mine (Tr. 46). The contractor and operator

are one and the same, and physically the mine is operated under a contract to do so with the Receivers (Tr. 47).

The witness, L. B. Plummer, further testified that the Applicants have acquired by grant or conveyance from the Glamorgan Coal Lands Corporation, owner of the fee title to the coal produced at the Glamorgan mine, the sole and exclusive right to extract, mine, load, and ship such coal (Tr. 48); that at the time they acquired title to the coal in the Glamorgan mine, they entered into contractual arrangements with Glamorgan Coals, Inc., identically similar in principle and effect with the arrangement between the Applicants and the contractor at the William-Ann mine, under which contract Glamorgan Coals, Inc., performed up to January 16, 1937, when Receivers were appointed, said Receivers assuming the obligation of performing the work and service of extracting, mining, and loading coal (Tr. 49); that A. E. Stone was appointed Receiver of the properties and assets of Glamorgan Coals, Inc., by decree of Wise County, Virginia, Superior Court on January 16, 1937; Walter T. Shunk was appointed a co-Receiver of such mine on February 14, 1937 (Tr. 50); modifications were made in the terms of the agreement (Tr. 50); some increases allowed in the compensation of the contractor (Tr. 51). The court entered an order directing the Glamorgan Receivers to adopt the Glamorgan Coals, Inc., contract (Tr. 51). Subsequently, an order was entered directing sale of the properties and assets of the Glamorgan Coals, Inc., subject to the assent of the Applicants (Tr. 52). The property was bid in by a representative acting for the Peerless Coal Corporation (Tr. 52, 53).

The witness, L. B. Plummer, further testified that the Applicants, under the same general plan, acquired by assignment and transfer from Chilton Block Coal Company the right to
469 take the coal from the Chilton Block mine; acquired ownership of the coal, with the assent of the Dingess-Rum Coal Company, owner of the fee, who had previously leased the right to take the coal to the Chilton Block Coal Company (Tr. 55, Ex. 3); that at the time of the arrangements Chilton Block mine had not been operated for some time, and the Receivers employed Daniel H. Pritchard to extract, mine, and load the coal on railroad cars and ship it for the account of the Receivers, to the Receivers, under a contractual arrangement entirely similar to the one existing in the William-Ann mine case (Tr. 55); that the Chilton Block arrangement was made originally in 1935, and has been continuously in effect through extension and renewal agreements with both the land owners and the operator (Tr. 56); that the various documents identified and introduced in evidence as

Exhibits constitute all the contractual arrangements between the lessor owners of the land and the Applicants (Tr. 60); that there are no other agreements of any nature or understandings, oral or otherwise, bearing upon or in any manner supplementing these written documents which have been introduced in evidence (Tr. 61); that none of the coal produced at either of these mines, except small quantities commonly known as house coal, is sold by the Applicants (Tr. 62); with that exception it is all shipped from mine to points on the lines of railroads owned by the Seaboard Airline Railroad Company, and operated by the Receivers, and is used and consumed by the Receivers in their operation of their railroads (Tr. 63); that definite instructions have been issued by the Receivers to the effect that no coal produced at this time shall be sold otherwise than for small domestic purposes to the miners there at the mine (Tr. 63); that none of the coal shipped to the Receivers from these mines is being sold or otherwise disposed of, all of it being consumed and used by the mines in the operation of its railroads (Tr. 63); that the Seaboard Airline Receivers supposedly consume over 1,000,000 tons of coal a year (Tr. 67); that Daniel Pritchard does business as an individual only (Tr. 73); that the Glamorgan Coal Land Corporation owns the fee of the Glamorgan mines; that on August 23, 1937, the interest of the Glamorgan Coals, Inc., in the improvement was foreclosed and sold to the Glamorgan Coal Land Corporation (Tr. 75, 76); the Glamorgan Coal Land Corporation purchased the mining equipment and property which previously belonged to the Glamorgan Coals, Inc., and the same arrangement has been made between the Glamorgan Coal Land Corporation and the Peerless Coal Corporation as existed between the Glamorgan Coal Land Corporation and the Glamorgan Coals, Inc. (Tr. 76); the Peerless Coal Corporation purchased at the sale the right, title, and interest of the Glamorgan Coals, Inc., or its receivers in the Glamorgan Coals, Inc., contract with the Applicants subject to the assent of the Seaboard; the Peerless Coal Corporation has agreed to continue to perform and carry out the obligations of that contract (Tr. 77); such Corporation operates identically in the same way that the Glamorgan Coals, Inc., operated before; they have adopted the Glamorgan Coals contract and assumed and agreed to carry out its performance (Tr. 78). The Peerless Coal Corporation is paid on an agreed flat compensation-per ton basis (Tr. 78). Daniel H. Pritchard is compensated by the Applicants on a flat sum per ton basis for his work and service in connection with the extraction of coal from the Chilton Block mine; it is the same arrangement identically as in the William-Ann mine (Tr. 55, 80, 81). The Receivers pay the freight on all

coal transported by off-line railways (Tr. 82, 83). The Applicants have the right to cancel the contract arrangements relating to the mining, extracting, and loading the coal, if they find they can procure coal cheaper elsewhere (Tr. 85); they have the right to specify how much coal they want produced at the mine (Tr. 86); the Applicants contend that they are producing coal through the agency and instrumentality of the contractor (Tr. 89); that the Applicants are the producers of the coal, and that the contract with the operators is an arrangement under which the Receivers have employed individuals to operate the mines for them (Tr. 90). The Applicants' lease with the Glamorgan Coal Land Corporation provides that the lease may be canceled in the event of termination of the contract or arrangement with the operator, but the lease and agreement with reference to the coal in case of the William-Ann mine and the Chilton Block No. 1 mine do not terminate upon the cancellation of the operator's contract (Tr. 108, 128). The United Thacker Coal Company is a corporation organized under the laws of the state of Maine (Tr. 110); the Peerless Coal Corporation is a corporation organized under the laws of the state of Virginia (Tr. 111); the Glamorgan Coal Land Corporation is a corporation organized under the laws of the state of Virginia (Tr. 111); the Glamorgan Coals, Inc., is a corporation organized under the laws of the state of Virginia (Tr. 112); the Chilton Block Coal Company is a corporation organized under the laws of the state of West Virginia (Tr. 112); the Dingess-Rum Coal Company is a corporation organized under the laws of the state of West Virginia (Tr. 113).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case; and, thereupon, the Applicants called as a witness Buford C. Tynes who, being first duly sworn, on his oath testified in substance as follows:

That he is Vice President and General Counsel of the United Thacker Coal Company in charge of the Company's physical properties in West Virginia, including its coal and timber lands (Tr. 114); that United Thacker Coal Company owns a little over sixty per cent of the William-Ann mine under leasehold in Mingo County; and the Cole and Crane real estate trust owns the remaining forty per cent of the acreage (Tr. 115); that the two landlords repossessed the property from William-Ann Coal Company, the then lessee (Tr. 116), in February 1934, and caused the Sheriff to make a levy for the preceding year's royalties that were in arrears, and under such levy the United Thacker bought the movable property (Tr. 116). The Applicants are granted the ex-

clusive right to mine coal from the leasehold (Tr. 118). The lease is for one year, with the privilege of renewal from year to year for four additional years after July 1, 1935 (Tr. 119). Article 17 of the lease requires the Receivers to elect as to whether or not they will extend the lease for another year (Tr. 120). Mr. H. Langdon Laws, Albert H. Cole, and Charles W. Campbell were Trustees of the Cole and Crane Company as of the date of the execution of lease to the Applicants (Tr. 123).

This witness, after having been dismissed, being recalled, testified in substance as follows:

That the lease of the United Thacker Coal Company and Cole and Crane Trustees, as lessors, to Daniel H. Pritchard (Ex. 7, Tr. 266, 267), is by its express terms made subordinate to the lease of the above lessors to the Applicants, and it expressly states that it does not go into effect unless and until the lease to the Applicants has terminated under its terms (Tr. 256).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

471 And, thereupon, the Applicants called as a witness J. J.

Kelly, Jr., who, being first duly sworn, on his oath testified in substance as follows:

That he is the Treasurer of the Glamorgan Coal Land Company, familiar with the instruments of conveyance from such Company to the Applicants and also the contracts which have continued in force since 1934 and are now in effect (Tr. 149); that W. C. Shunk, representing the Peerless Coal Corporation, purchased the contracts with the Seaboard at the sale of the properties of the Glamorgan Coals, Inc., held in August 1934 (Tr. 150). There was an oral understanding with the Peerless Coal Corporation that the mixing equipment would be sold to them (Tr. 151); that the Glamorgan Coal Land Company is simply a landholding and leasing company (Tr. 153), not operating any coal mines (Tr. 154), and having no interest in the Glamorgan Coals, Inc., mining equipment (Tr. 154). The sale of the property and assets of the Glamorgan Coals, Inc., resulted in the purchase of such property by Glamorgan Coal Land Company for \$37,800, which company contracted to sell it to the Peerless Coal Corporation (Tr. 155).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

And, thereupon, the Applicants called as a witness Walter C. Shunk, who, being first duly sworn, on his oath testified in substance as follows:

That he is President, General Manager, and Treasurer of the Peerless Coal Corporation, and formerly a co-Receiver (Tr. 159) of the Glamorgan Coals, Inc.; that a decree was entered in the Superior Court of Wise County, Virginia, authorizing and directing the Receivers of the Glamorgan Coals, Inc., to adopt the carrying out and performing of the contract between such corporation and the Applicants (Tr. 158); that during the existence of the receivership such contract was carried out and performed by the Receivers of the Glamorgan Coals, Inc., (Tr. 158); that the Peerless Coal Corporation is compensated for work and services performed under its contract with the Applicants on a flat price per ton basis (Tr. 159); that the Glamorgan Coals, Inc., produced from January 15th to September 1st, 1937, under the co-receivership, approximately 80,000 tons of coal (Tr. 160) that the price per ton varied from \$1.62 to \$1.80 (Tr. 160-161); that the Applicants paid the Receivers of the Glamorgan Coals, Inc., by check each week for the coal shipped during the preceding week (Tr. 151).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

And, thereupon, the Applicants recalled as a witness Buford C. Tynes, whose relevant and material testimony is hereinabove already set forth, and following such testimony the Applicants called as a witness Joseph L. Gaudin, who, being first duly sworn, on his oath testified in substance as follows:

That he has been continuously employed as fuel representative in the purchasing department of the Applicants since 1934; that among his duties he gives monthly and weekly instructions to the mine operators concerning tonnage to be mined and shipped to
 472 to meet Applicants' requirements at specified points on the Applicants' line (Tr. 197); that all of the coal from the mines involved in this application is shipped to the Applicants for their use and consumption, and to no other party, except a small amount of house coal that is used by the labor employed around the mine (Tr. 197-198); the coal is shipped by or for the account of the Applicants at their own risk, they have to stand any loss due to wrecks, theft, or other loss in transit, except such loss as can be recovered from off-line carriers (Tr. 198). The shipping instructions as to the transportation of the coal from each of the three mines involved are the same except for the amount of tonnage (Tr. 200). Coal loaded at and transported from the William-Ann mine as a general thing is billed to Ryan, Virginia; Hartman, Virginia; Coolan, North Carolina, and Gibson, North Carolina (Tr. 201); from Chilton Block Mine No. 1

coal is generally billed to Apex, North Carolina, and to Hann, Virginia (Tr. 202); coal from the Glamorgan mine as a general thing is billed to Wiggins, South Carolina; occasionally these destinations are changed; a portion of this coal might be billed to Stubbs, North Carolina (Tr. 202); these billings represent practically the entire tonnage of the mines with the exception of such coal as is sold to employees (Tr. 202); coal is loaded into cars by the operator (Tr. 203). The total coal consumption of the Applicants for the year 1936 is approximately 1,000,000 tons (Tr. 207); the mines involved in this application furnishing approximately fifty per cent of the Applicants' consumption (Tr. 208). The Applicants operate as a common carrier in the states of Virginia, North Carolina, South Carolina, Alabama, Florida, and Georgia (Tr. 208).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

And, thereupon, the Applicants called as a witness C. Allen Perry, who, being first duly sworn, on his oath testified in substance as follows:

That he is the Chief Clerk of the transportation department of the Applicants, and has been since 1934; that his duties include distribution of the coal obtained by the Applicants for use in the operation of the railroads in their possession and control; that he estimates the monthly coal requirements of the Receivers and advises the purchasing department thereof (Tr. 213); that he also has charge of and directs the distribution of coal shipped to the Applicants from the William-Ann mine in Mingo County, West Virginia, the Glamorgan mine in Wise County, Virginia, and the Chilton Block No. 1 mine in Logan County, West Virginia (Tr. 213-214); that all of such coal is consumed or used by the Applicant in the operation of the railroads in their possession and control. Daniel H. Pritchard ships coal to the Applicants from the William-Ann mine and the Chilton Block No. 1 mine located in West Virginia; and the Peerless Coal Corporation ships coal to the Applicants from the Glamorgan mine in Virginia (Tr. 215); the operators of these various mines receive instructions from the purchasing department of the Applicants to wire the transportation department of the Applicants each day, by Western Union, the number of cars of coal which they ship (Tr. 215). Applicants later get a mail confirmation giving the individual car numbers (Tr. 216); that when the coal is shipped Applicants follow it up on the foreign lines to see that it gets to its proper billed destination, and is then distributed to the districts to which it is supposed to go (Tr. 216); all of

these mines are located on lines other than the Applicants'.
 473 It has to move over the other lines on regular revenue billing (Tr. 216); it is received by the Applicants at the junction point, and company waybill is prepared that travels with the car until it is unloaded (Tr. 217). The Chilton Block mine No. 1 is located on the C. & O. railroad, and the coal from such mine is delivered to the Applicants at Richmond, Virginia, by the C. & O. railroad (Tr. 217). Such coal is rebilled on Applicants' waybill, and the company waybill follows the car until it is unloaded on a chute or disposed of (Tr. 217). Coal from the William-Ann mine is delivered to the Applicants at Petersburg, Virginia, and Durham, North Carolina (Tr. 218). The Glamorgan mine is located on the Interstate Railroad; coal from this mine moves to Miller Yard, Virginia, where it is turned over to Clinchfield Railroad, which transports it to the Applicants at Bostick, North Carolina (Tr. 218). Coal from the William-Ann mine and the Chilton Block No. 1 mine is ordinarily used in the states of Virginia and North and South Carolina; coal from the Glamorgan mine is ordinarily used in the states of North Carolina, South Carolina, Georgia, and Florida (Tr. 225).

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

And, thereupon, the Applicants called as a witness Daniel H. Pritchard who, being first duly sworn, on his oath testified in substance as follows:

That he is President of the Chilton Block Coal Company; that at the time the Applicants "acquired title to the coal at the Chilton Block No. 1 mine" the Chilton Block Coal Company had leased the coal from the Dingess-Rum Coal Company (Tr. 233); that the royalty paid by the Applicants on coal produced at the Chilton Block No. 1 mine is paid by the Applicants for the account of the Dingess-Rum Coal Company (Tr. 234).

It is billed on a railroad car tag showing the number of the mine, the date that the coal was loaded, the shipper, the consignee, and whether or not the freight should be paid or prepaid (Tr. 235). The coal is billed from the Receivers of the Seaboard Airline Railway to the Receivers of the Seaboard Airline Railway, to different destinations (Tr. 236). Practically the same practice is followed with reference to the Chilton Block mine, but the operator does not place the tags on the railroad cars; instead, they are put in a box and picked up by the railroad conductor (Tr. 236). In both cases the Applicants are shown in the bill of lading as being both the shipper and the consignee (Tr. 236). The Applicants have no control over the operations of the

Chilton Block No. 1 mine in reference to the hiring and discharging of miners and the buying of supplies and equipment (Tr. 242). The approximate coal production of the Chilton Block No. 1 mine in 1936 was 100,000 tons (Tr. 250). The approximate production of the William-Ann mine (during the same year) was 240,000 tons.

The above abstract constitutes all of the testimony of this witness, in the opinion of the examiner, that is relevant or material to the issues in this case.

The above abstract of evidence constitutes all of the testimony and evidence adduced on the hearing of this cause that, in the opinion of the examiner, is relevant or material to the issues here made.

474

JULY 28, 1938.

RECEIVERS OF SEABOARD AIR LINE RAILWAY CO.,

S. A. L. Building, Norfolk, Virginia.

GENTLEMEN: We are transmitting to you herewith, by registered mail, a true and correct copy of the findings and recommendations of the Examiner, "In the Matter of the Application of Receivers of the Seaboard Air Line Railway Co. for Exemption," Docket Number 49-FD. The original of this copy was filed in the Docket Section on the date of December 7, 1937.

This copy is being served upon you in accordance with Rules 22, 24, 25, and 26 of the "Rules of Practice and Procedure before the Commission" promulgated June 12, 1937, amended November 5, 1937, and amended June 6, 1938.

Very truly yours,

NATIONAL BITUMINOUS COAL COMMISSION.

By F. W. McCULLOUGH, *Secretary.*

Encl.

2.

R. K. Marquardt: vb.

Return Receipt No. 743902.

Date of Delivery, 7-28-38.

475

JULY 28, 1938.

BITUMINOUS COAL PRODUCERS BOARD FOR DISTRICT NO. 8.

Transportation Building, Cincinnati, Ohio.

GENTLEMEN: We are transmitting to you herewith, by registered mail, a true and correct copy of the findings and recommendations of the Examiner "In the Matter of the Application of Receivers of Seaboard Air Line Railway Company for Ex-

emption." Docket Number 49-FD. The original of this copy was filed in the Docket Section on the date of December 7, 1937.

This copy is being served upon you as an interested party in the above matter in accordance with Rules 22, 24, 25, and 26 of the "Rules of Practice and Procedure before the Commission" promulgated June 12, 1937, amended November 5, 1937, and amended June 6, 1938.

Very truly yours,

NATIONAL BITUMINOUS COAL COMMISSION.
By F. W. McCULLOUGH, *Secretary*.

Encl.

2.

R. K. Marquardt : vb.

Return Receipt No. 743901.

Date of Delivery, 7-29-38.

476 Before National Bituminous Coal Commission

Memorandum re extension of time

AUGUST 10, 1938.

To: Mr. Marquardt.

From: F. W. McCullough.

Subject: Granting of extension of time to Seaboard Airline Railway Company in which to file Exceptions to the Examiner's Report entered in the matter of their application for exemption.

Attached is a copy of a telegram which is being sent to Mr. L. B. Plummer of Seaboard Air Line Railway Company of Norfolk, Virginia, granting an extension of time until September 1, for filing exemptions to the Examiner's report. This refers to Docket No. FD-49.

• (s) F. W. McCULLOUGH,
Secretary.

477

734 15TH ST., NW.,

Washington, D. C., August 10, 1938.

Mr. L. B. PLUMMER,

Counsel for Receivers,

Seaboard Air Line Railway Co., Norfolk, Virginia.

Time extended to September 1 to file exemptions to examiner's report.

F. W. McCULLOUGH,
Secretary, National Bituminous Coal Commission.

478 Before the National Bituminous Coal Commission

In the Matter of the Application of L. R. POWELL, JR., AND
HENRY W. ANDERSON, AS RECEIVERS OF SEABOARD AIR LINE
RAILWAY COMPANY, FOR EXEMPTION FROM THE PROVISIONS OF
THE BITUMINOUS COAL ACT OF 1937

Docket No. 49-FD

Applicants' (a) exceptions to proposed report and recommendations of the trial examiner and (b) brief

Norfolk, Va., August 29, 1938.

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TABLE OF CASES CITED

- Adonique v. Carmen, 151 Ky. 249, 151 S. W. 921.
Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160.
Eubank v. Richmond, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156.
Foss-Hughes Co. v. Lederer, 287 F. 150.
Galveston Causeway Construction Co. v. Galveston H. & S. A. Ry. Co., 284 F. 137, affirmed 287 F. 1021; cert. denied, 292 U. S. 747, 43 S. Ct. 503, 67 L. Ed. 1212.
Hairston v. Hill, 118 Va. 339, 87 S. E. 573.
Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928.
Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237.
Minor v. Pursglove Coal Mining Co., 111 W. Va. 28, 161 S. E. 425.
Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929.
Restatement of the Law—Agency, Vol. 1.
Rothschild v. Northern Pacific R. Co., 68 Wash. 527, 123 Pac. 1011.
Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.
Sears-Roebuck, etc. v. Commissioner of Internal Revenue, 45 F. (2d) 506.
Three-Forks Coal Co. v. United States, 9 F. (2d) 946.
Washington ex rel Seattle Trust Co. v. Roberge, 278 U. S. 116, 49 S. Ct. 50, 73 L. Ed. 210.

480 *Exceptions of applicants to report and recommendations of the trial examiner*

Come now Leigh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, the Applicants, and except to the report and recommendations of the Trial Examiner (hereinafter called "Examiner") in the above proceeding on the following grounds:

Exception No. 1

The Examiner erred in failing to find that the provisions of Section 4 and of the first paragraph of Section 4-A of the Bituminous Coal Act of 1937, as a matter of law, relate and apply only to coal which is sold, or title to which is otherwise transferred, by the producer thereof, and to the distribution of, and commerce or transactions in, coal which is sold or the title to which is otherwise transferred by the producer thereof (Ex. Rep. p. 16, par. 4).

481 Exception No. 2

The Examiner erred in failing to find that the coal produced at each of these mines is not sold or the title thereto otherwise transferred by the producer of such coal and that the distribution of, and other transactions in, such coal involve no sale or other transfer of title by the producer of such coal (Ex. Rep. p. 16, par. 4).

Exception No. 3

The Examiner erred in failing to find that the provisions of Section 4 and the provisions of the first paragraph of Section 4-A of the Bituminous Coal Act of 1937 do not, as a matter of law, relate or apply, or purport to relate or apply, to the coal produced at any of the three mines involved in this proceeding, or to the distribution, commerce, or transactions in such coal (Ex. Rep. p. 16, par. 4).

Exception No. 4

The Examiner erred in failing to find that if Section 4 of said Act relates or applies, or purports to relate or apply, to the coal produced at any of these mines, or to the distribution, commerce, or transactions in such coal, said Section, if and to the extent so applied, is unconstitutional, void, and unenforceable, as violative and in contravention of (i) the commerce clause of the Constitution of the United States, to wit: Article One, Section 8, Clause 3 thereof, and (ii) the due process clause of the Constitution of

the United States, to wit: the Fifth Amendment thereof (Ex. Rep. p. 18, par. 2).

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Exception No. 5

While the Examiner finds that all of the coal (except a negligible quantity of so-called "house coal") produced from these mines is consumed by Applicants, he erred in failing to find (a) that Applicants solely and exclusively own and possess, and exercise the sole and exclusive right of disposition and distribution of, all of the coal produced from said mines, and (b) that all of said coal is transported and distributed by Applicants to themselves (Ex. Rep. Finding 2, p. 12).

Exception No. 6

The Examiner erred in finding that the activities or transactions in or in respect of the coal produced at these three mines cause any undue or unreasonable advantage, preference, or prejudice as between intrastate commerce in coal on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal or in any manner directly affect interstate commerce in coal (Ex. Rep. p. 16, par. 4).

Exception No. 7

The Examiner erred in failing to find that for the purposes of the mining, removing, and loading of the coal involved in this proceeding, the contractors employed by Applicants are, irrespective of their status as independent contractors, the agents of Applicants (Ex. Rep. p. 13, par. 3).

483

Exception No. 8

The Examiner erred in finding that Applicants are not "producers" of the coal at each of these three mines within the meaning and intent of the provisions of Section 4 (1) and/or of the second paragraph of Section 4-A of the Bituminous Coal Act of 1937 (Ex. Rep. p. 17, par. 5).

Exception No. 9

The Examiner erred in finding that to entitle a producer to exemption from the provisions of Section 4 of said Act such producer must be "engaged in the business of mining coal" (Ex. Rep. p. 15, par. 3).

Exception No. 10

The Examiner erred (a) in finding that Applicants are not, in the case of the William-Ann Mine, located in Mingo County, West Virginia, and Chilton Block No. 1 Mine, located in Logan County, West Virginia, "engaged in the business of mining coal" in the State of West Virginia, and in finding, if his report be so intended, that Applicants are not, in the case of the Glamorgan Mine, located in Wise County, Virginia, engaged in such business in the State of Virginia, and (b) in giving any consideration or weight in this proceeding to the question of the charter power of Seaboard Air Line Railway Company, or of the authority of Applicants, as its Receivers, to engage in the business of mining coal, or the question of whether or not Seaboard Air Line Railway Company or Applicants, as its Receivers, are licensed by the State of West Virginia to engage in the business of mining coal in that State (Ex. Rep. p. 15, par. 3, et seq.).

484

Exception No. 11

The Examiner erred in recommending that order be entered by the Commission in this proceeding to the effect that Applicants are not the producers of the coal within the meaning and intent of Section 4-A of the Act or within the meaning and intent of such term as used in subsection 4 (1) thereof, and in recommending that the exemption applied for by Applicants be denied (Ex. Rep., p. 18, Recommendation).

485

Statement of the Case

This proceeding was instituted by petition, filed by Applicants in their capacity as Receivers of Seaboard Air Line Railway, on August 4, 1937, for exemption from the provisions of Section 4 of the Bituminous Coal Act of 1937. Testimony in support of the application was heard by Examiner Cantrell, of the Bituminous Coal Commission, on September 22 and 23, 1937.

The proposed report of the Examiner, which recommends that the Commission deny the Applicants' petition for exemption, was served upon Applicants on July 29, 1938. Upon Applicants' written request the Commission extended to September 1, 1938, the time for filing exceptions to the Examiner's report.

The basic facts are that Applicants acquired, under the direction and with the authority of the Receivership Court, in the years 1934 and 1935, from the respective fee owners, and now hold, title to the coal in place at the following three mines: the Glamorgan Mine, located in Wise County, Virginia; the William-

Ann Mine, in Mingo County, West Virginia; and the Chilton Block No. 1 Mine, located in Logan County, West Virginia. No question has been or can be raised as to the rights of the Applicants in these mines and the coal therein and in the adjacent lands covered by the conveyances, nor as to the definite and continuing obligations of the Applicants to the grantors under the conveyances.

At the time of the acquisition by Applicants (hereinafter sometimes referred to as "Receivers") of the coal lands, contracts were entered into with operators, skilled in the work of coal mining, under which contracts the operators extract and
486 load Applicants' coal, and are compensated for their service in amounts agreed upon. Certain taxes on the land, the tax of one cent (1c) per ton levied upon the coal under the provisions of Section 3 (a) of the Bituminous Coal Act of 1937, and the royalties accruing to the fee owners are paid direct by the Applicants.

As above stated, all of the coal produced from these mines is coal which is owned in place by the Receivers and is extracted and mined for their exclusive use through the instrumentality of contractors employed by them. All of the coal (except a negligible quantity of so-called "house coal") is loaded by the contractors on railroad cars at the mine tippie, is shipped from the mine by, or on behalf of the Receivers, to the Receivers and is consumed by them solely in the operation of the railroad. No sale of or other transfer of title to the coal occurs.

This proceeding presents for decision, therefore, the fundamental question whether the mining of coal owned by a railroad, for use by it in its own operations, is subject to the provisions of Section 4 of the Bituminous Coal Act.

As presented by the undisputed facts in this record, the following specific questions are involved:

(a) Whether the mining of their coal for railroad use by the Receivers under the particular contracts here involved subjects the railroad's Receivers to the provisions of Section 4 of the Act, as a matter of law.

(b) Whether the Receivers are not expressly exempt from the operation of Section 4 by the terms of subsection 4 (1) of the Act.

(c) Whether, if held to apply by its terms to the Receivers, the Act or Section 4 thereof, is unconstitutional and void.

487 A subsidiary question is involved in the determination of these main questions, namely, whether the mining of the coal, which is an intrastate activity, may be brought within the reach of Section 4, by virtue of the provisions of Section 4-A of the Act.

The report and recommendations of the Examiner are adverse to the contentions of Applicants upon these fundamental questions and as to certain related questions, and are erroneous and incomplete in the several respects hereinafter noted.

488

Exception No. 1

The Examiner erred in failing to find that the provisions of Section 4 and of the first paragraph of Section 4-A of the Bituminous Coal Act of 1937, as a matter of law, relate and apply only to coal which is sold, or title to which is otherwise transferred, by the producer thereof, and to the distribution of, and commerce or transactions in, coal which is sold or the title to which is otherwise transferred by the producer thereof.

Exception No. 2

The Examiner erred in failing to find that the coal produced at each of these mines is not sold or the title thereto otherwise transferred by the producer of such coal and that the distribution of, and other transactions in, such coal involve no sale or other transfer of title by the producer of such coal.

Exception No. 3

The Examiner erred in failing to find that the provisions of Section 4 and the provisions of the first paragraph of Section 4-A of the Bituminous Coal Act of 1937 do not, as a matter of law, relate or apply, or purport to relate or apply, to the coal produced at any of the three mines involved in this proceeding, or to the distribution, commerce or transactions in such coal.

These Exceptions Nos. 1, 2, and 3 are closely interrelated, involve the legal interpretation of the intent and scope of Section 4 of the Act, and are directed to the error of the Examiner in

failing to find that, as a matter of law, the provisions of

489 Section 4 and of the first paragraph of Section 4-A of the Act do not relate or apply, or purport to relate or apply, to any of the coal, or the mining and handling thereof or transactions therein, involved in this proceeding. For convenience these Exceptions are considered and discussed together.

As stated in Applicants' Petition and in Section 1 (a) of their Brief and Argument heretofore filed with the Commission, the provisions of Section 4 and of Section 4-A of the Act, by the express terms thereof, relate or apply only where the coal involved is sold, or the title thereto is otherwise transferred, by the producer, and to transactions or commerce in coal which is sold, or the title to which is otherwise transferred, by the pro-

ducer. The reasons which support Applicants' contention that Section 4 of the Act, by the express provisions of the Act itself, is so limited in its intent and scope are fully set forth in Section 1 (a) of Applicants' Brief and Argument. Applicants adopt and incorporate by reference in these Exceptions Nos. 1, 2, and 3 all of the arguments, matters, and things set forth in Section 1 (a) of their said Brief and Argument.

The documentary proof (Ex. 1 to 6, inclusive) and oral evidence adduced at the hearing (R. pp. 197, 198, 214, 159, 163, 176, 177, 180, 182, 232, 237, 243), and wholly uncontradicted, establishes clearly that no sale or other transfer of title by the producer of the coal involved in this proceeding occurs and the Examiner erred in not so finding and in failing to find that the provisions of Section 4 and the provisions of the first paragraph of Section 4-A of the Act do not, as a matter of law, relate or apply, or purport to relate or apply, to the coal produced at any of these mines and transported to and consumed by Applicants, or to the transactions or commerce in such coal.

In further support of these Exceptions Nos. 1, 2, and 3 Applicants assert that as Section 4-A of the Act deals solely with "transactions in coal in intrastate commerce" and the effect thereof upon interstate commerce, it necessarily follows that unless the transaction be a "transaction in coal in intrastate commerce" Section 4-A of the Act has no application. It is clear that under the authority of *Oliver Iron Co. v. Lord*, 262 U. S. 172-8, 43 S. Ct. 526-9, 67 L. Ed. 929; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260, 43 S. Ct. 83, 86, 67 L. Ed. 237; and *Carter v. Carter Coal Co.*, 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (cited in subdivision 1-(b) of Applicants' said Brief and Argument) the work and service performed for Applicants by Peerless Coal Corporation and D. H. Pritchard, respectively, i. e., the extracting, mining, and loading into cars at the mine tippie of the coal, is not commerce in coal or "transactions in coal in intrastate commerce" and that the character of such activities is not affected by the intended use or disposal of the product of such work and service; further, that the local and noncommercial character thereof persists even though such work and service might be said to be performed in close connection with interstate commerce, or in contemplation of interstate transportation.

By its express terms Section 4 of the Act (except as otherwise provided by subsection (b) of Part II thereof, which exception is not pertinent to this proceeding) applies only to code members who, said section provides and as the Examiner has in effect found (Ex. Rep. p. 14), must be producers of the

coal. The "transactions in coal in intrastate commerce" intended by Congress to be within the scope and intent of the first paragraph of Section 4-A and subject to regulation by the Commission thereunder are transactions, and transactions only, which involve the sale, delivery for sale, or offer for sale, of the coal by the producer. This we submit is indisputably clear from the express provisions of the first paragraph of Section 4-A itself, which paragraph provides (after the Commission shall have found and by order declared that "transactions in coal in intrastate commerce" injuriously and directly affect interstate commerce) that "thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of Section 4."

As above stated, the first paragraph of Section 4-A of the Act by its express terms relates and applies only to "transactions in coal in intrastate commerce." Treating this term "commerce" in its broadest sense, i. e., as meaning transactions involving the sale, barter, or exchange of property, property rights or services, and treating for the sake of argument (but expressly denying) that Receivers' transactions with their contractors are "commerce" in such broad sense, Applicants in further support of their contention that the transactions involved in this proceeding are, as a matter of law, not within the scope and intent of Section 4 and of the first paragraph of Section 4-A of the Act, point out that the transactions with their contractors are not "commerce in coal," but are commerce or transactions in work and service performed by the contractors for Applicants in exchange and consideration for compensation paid therefor by Applicants, and are not subject to the provisions of Section 4 and of the first paragraph of Section 4-A of the Act.

The Examiner in his report (p. 16) stresses the point that the Act is intended to regulate not only the sale or disposal but also the distribution of bituminous coal in interstate commerce and transactions in coal in intrastate commerce found by the Commission to injuriously and directly affect interstate commerce. He seeks on the ground that the distribution of coal in interstate commerce is also regulated by the Act to support his finding that Sections 4 and 4-A—the Code provisions of the Act, apply to the coal and the transactions involved in this particular proceeding. In such attempt the Examiner completely overlooks or ignores the plain intent and purpose of Congress, declared in and by the Act itself, to limit and confine the application of Sections 4 and 4-A of the Act to coal which is sold or otherwise disposed of by the producer, and to the distribution or other transactions in coal only when such distribution or transactions occur in the sale of or other transfer of the title to the coal

by the producer. "Distribution," as used in the Act, is not synonymous with transportation. To distribute is to divide or apportion or deal out among several or many. The

Receivers are not engaged in the distribution, in any legal sense, of the coal here involved, since they merely transport their own coal from the mines and place same at convenient points on the railroad for their own use. As above stated, it has been established by clear and uncontroverted evidence in the instant case that no sale of, or other transfer of title to, the coal by the producer occurs. It follows, Applicants submit, that the transaction treated by the Examiner as a "distribution" is not a distribution within the meaning of the Act, that the provisions of Sections 4 and 4-A of the Act, as a matter of law, have no application to such transactions and that the Examiner erred in failing to so find.

Exception No. 4

The Examiner erred in failing to find that if Section 4 of said Act relates or applies, or purports to relate or apply, to the coal produced at any of these mines, or to the distribution, commerce, or transactions in such coal, said Section, if and to the extent so applied, is unconstitutional, void, and unenforceable, as violative and in contravention of (i) the commerce clause of the Constitution of the United States, to wit: Article One, Section 8, Clause 3 thereof, and (ii) the due process clause of the Constitution of the United States, to wit: the Fifth Amendment thereof.

The evidence given at the hearing and wholly uncontradicted is conclusive that all the coal produced at these mines is Applicants' own property, that the total output (except the negligible quantity of so-called "house coal") is shipped by Applicants to themselves and consumed by them in the operation of the railroads in their possession and control. If in this state of established facts Section 4—the code provisions of the Act relate or apply, or purport to relate or apply, to coal produced at these mines, and which is so owned, shipped, and consumed, said Section 4, to the extent so related or applied, would require that coal for the sole use of the owner be produced only at a cost to the owner determined and fixed by the Commission. This would constitute an arbitrary and unreasonable regulation by Congress of a purely local and private activity which is not a "transaction in coal" and which does not directly affect interstate commerce. The activity thus sought to be regulated is the work and service performed for the Receivers by their contractors, and the regulation would modify and control compensation re-

lations and engagements between Applicants and the parties performing for them a work and service entirely local and which is not commerce in coal, arbitrarily and without any reasonable relation to any legitimate Congressional privilege. Accordingly, the provisions of Section 4 of the Act, if said provisions relate or apply, or purport to relate or apply, to coal produced at these mines which is owned and consumed by Applicants, or to the distribution, commerce, or transactions in such coal, would deny to Applicants the rights safeguarded by, and be violative and in contravention of, the commerce, to wit: Article One, Section 8,

Clause 3, and the due process clause, to wit: the Fifth Amendment, of the Constitution of the United States. That Section

4 of the Act, if and to the extent said Section so relates or applies, or purports to so relate or apply, is unconstitutional, void and unenforceable, is made plain by the following decisions of the Supreme Court of the United States:

Oliver Iron Co. v. Lord, 262 U. S. 172-8, 43 S. Ct. 526-9, 67 L. Ed. 929;

Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 260, 43 S. Ct. 83, 86, 67 L. Ed. 237;

Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 80 L. Ed. 1160;

Schechter Poultry Corp. v. United States, 295 U. S. 495, 537, 55 S. Ct. 837, 79 L. Ed. 1570;

Eubank v. Richmond, 226 U. S. 137, 143, 33 S. Ct. 76, 57 L. Ed. 156;

Washington ex rel Seattle Trust Co. v. Roberge, 278 U. S. 116, 121, 122, 49 S. Ct. 50, 73 L. Ed. 210.

The Examiner erred in failing to so find, and in summarily dismissing as unnecessary to be considered upon the record in this proceeding the alleged unconstitutionality of Section 4 of the Act. Since he has held that the Section relates or applies to the coal and activities or transactions involved in this proceeding, he must necessarily determine the validity of such application.

Exception No. 5

While the Examiner finds that all of the coal (except a negligible quantity of so-called "house coal") produced from these mines is consumed by Applicants, he erred in failing to find (a) that Applicants solely and exclusively own and possess, and exercise the sole and exclusive right of disposition and distribution of, all of the coal produced from said mines, and (b) that all of said coal is transported and distributed by Applicants to themselves.

The ownership of the coal by Applicants is a basic element of Applicants' right of exemption and Applicants are
 496 entitled to a specific finding by the Commission upon this point. It is clear from the documentary proof (Ex. 1 to 6, inclusive) and the oral evidence by Mr. Plummer (R. pp. 40, 41, 42, 45, 48, 54, and 55), Mr. Tynes (R. pp. 120-121), Mr. Kelly, (R. p. 132), Mr. Pritchard (R. pp. 233, 235, 237, 238, 243, 244-246) and Mr. Shunk (R. pp. 176, 181-182) that Applicants solely and exclusively own and possess, and exercise the sole and exclusive right of disposition and distribution of, all of the coal produced at these mines.

The following decisions of the West Virginia and Virginia Courts fully sustain Applicants' contention that under and by virtue of the instruments of conveyance in evidence in this proceeding (R. Ex. 1, 2, and 3) Applicants own all the coal in place produced from these mines:

Minor v. Pursglove Coal Mining Co., 111 W. Va. 28, 161 S. E. 425. This was a suit to determine whether the conveyance was a lease or a bill of sale. The court held it to be a lease, but the part material here is that the lessee was considered to have title:

"* * * the fee owners carved out of the fee, or particular estate and vested it in another. The instrument or conveyance gave certain title to Gilbert and Davis to produce certain personal property, a product of the land. The parties, so far as we may judge, thought they were making a lease * * *."

"In view of all this, we are constrained to denominate the instrument under consideration a lease."

Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928, was a suit to enjoin the collection of a tax on leaseholds which the assessor levied against mining property under the head
 of chattels real. The court gave judgment for the tax
 496 collector. The case contains a full discussion of the right, title, and ownership of lessees of mining property, and fully supports the position that Applicants have maintained. Significant quotations from the decision are as follows:

"Anything capyable of beneficial ownership is property—in this instance a valuable right arising by contract, a right to take coal from the body of land, using the land for that purpose, and convert it into salable coal, a commodity of great commercial value. 'Man's right in respect to things constitutes property.' 2 *Minor's Institutes*, 1. The company's right to produce commercial, merchantable coal for market and manufacture coke is a right in respect to the land, and that mere right, under the contract, is property. The sole and despotic dominion which one

man claims and exercises over external things of the world, in total exclusion of the rights of any other, is property. 2 Bl. Co. 2. The right to possess, use, enjoy, and dispose of a thing is property which is in itself valuable. *Jones v. Vanzault*, 4 McLean, 603, Fed. Cas. No. 7, 503; *Bouvier L. Dic.*, word 'property.' A mining right in government land is property in the miner, and property of value, and may be taxed by the state, and the state may sell it for taxes. *Forbes v. Gracey*, 94 U. S. 762, 24 L. Ed. 313. I repeat that plainly the right vested in the coal company, and being actually exercised, is property, and the Legislature has full power to tax it in some manner.

* * * * *

"In 18 Am. & Eng. Enc. of Law (2d Ed.) 597, we find a 'lease' defined thus: 'A lease is a contract for the possession and profits of lands and tenements on the one side and the recompense or rents on the other, or in other words, a conveyance to a person for life, years or at will, in consideration of a rent, or other recompense.'

"Try this property or right under these definitions. It is surely a lease, and therefore a chattel real. The fee owner carves out of his fee a particular estate and vests it in another. The coal having been developed, then, if not before, an actual estate vested as to the coal right, an entity, a distinct entity, a separate property from that remaining in the lessor. The instrument of conveyance gave certain title to the coal company, gave it an intangible right; that is, a right to produce personal property, a product of the land."

498 The Virginia Court is in accord with the West Virginia Court, as is shown by the following quotation from *Hairs-ton v. Hill*, 118 Va. 339, 87 S. E. 573, which was a suit to determine whether an instrument was a mere license or a lease. The court said:

"It is not necessary to go outside the decisions of this court to find authority for the well-marked dividing line between the class of agreements which constitute revocable licenses, and those which, like the contract in this case, grant an estate on easement in land."

With the views of the courts of last resort in the state in which the Applicant's mines are located before it, we submit that the Commission has no alternative but to find that Applicants are owners of the coal involved.

The Examiner erred in finding that Daniel H. Pritchard and Peerless Coal Corporation ship the coal mined at the three mines here involved, and in failing to find that all of the coal shipped from these mines is transported and distributed by Applicants to,

themselves. Such finding by the Examiner is in clear disregard of the contract provisions and the facts, as testified to by witnesses at the hearing, in respect of the shipment of the coal. Applicants' agreements with their contractors (Ex. 4, 5, and 6) expressly provide that coal mined and loaded by the contractor thereunder "is to be shipped by the Receivers, or by the contractor for their account, to points and via routes as prescribed by the Receivers."

Uncontroverted testimony as to the shipment of the coal—by Mr. Pritchard from the William-Ann and Chilton Block No. 1 Mines (R. pp. 235-236) and by Mr. Shunk from the Glamorgan Mine (R. pp. 172-173)—is to the effect that the coal is shipped,

499 in conformity with the above-stated contract provisions, by or for account of Applicants, and is consigned to Applicants. In this connection particular attention is called to Mr. Pritchard's testimony (R. pp. 235, 236), when questioned by the Examiner, that the coal is billed from the Applicants to themselves—in other words, the car tag and the bill of lading show Applicants to be both the shipper and the consignee of the coal.

The Examiner's finding that the contractors ship the coal is misleading and erroneous and implies that the shipment thereof from the mine consigned to Applicants is a shipment by the contractor by virtue of a right of disposition of the coal inhering in the contractor. This is clearly contrary to the evidence above referred to which is to the effect that the contractor's responsibility in respect of the coal ends when it is loaded in the railroad car at the mine, that the contractor has no right of disposition of the coal, that it is Applicants' own property, is shipped from the mine to Applicants only as and when Applicants direct and, pursuant to the contract provisions, is so shipped by the contractor, acting, in each case, for and as the agent of Applicants (R. pp. 176, 232, 243).

Exception No. 6

The Examiner erred in finding that the activities or transactions in or in respect of the coal produced at these three mines cause any undue or unreasonable advantage, preference, or prejudice as between intrastate commerce in coal on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable or unjust discrimination against interstate

500 commerce in coal, or in any manner directly affect interstate commerce in coal.

As pointed out in Applicants' Brief (Sec. 1, p. 6, et seq.), Section 4 of the Act, by the express provisions of the third paragraph thereof, is applicable only to matters and transactions in or di-

rectly affecting interstate commerce in bituminous coal. The following decisions of the United States Supreme Court, cited in Applicants' Brief (pp. 10, 11, 12), establish clearly and conclusively that the mining and production of coal is not commerce and does not directly affect interstate commerce: *Oliver Iron Co. v. Lord*, *Heisler v. Thomas Colliery Co.*, *Carter v. Carter Coal Co.*, *Schechter Poultry Corp. v. United States*, *Eubank v. Richmond*, *Washington ex rel. Seattle Trust Co. v. Roberge*, *supra*. These decisions likewise enunciate the well-established principle that the relation of employer and employee in the mining and production of coal is a local relation and that such employees are not engaged in or about commerce. The relationship between Applicants and D. H. Pritchard and Peerless Coal Corporation, respectively, is a local relation, such parties in performing the work and service under their respective agreements with Applicants are performing local work and service, are not engaged in or about commerce in coal, and the effect, if any, of such transactions upon interstate commerce is not direct but secondary and indirect.

That "transactions in coal in intrastate commerce" (only where the coal is sold or the title thereto is otherwise transferred by the producer) are within the purview of Section 4 and of the first paragraph of Section 4-A of the Act, is confirmed and made more certain by the express provisions of that paragraph 501 of Section 4-A that where the Commission shall have found and by order declared that "transactions in coal in intrastate commerce" directly and injuriously affect interstate commerce, "thereafter coal sold, delivered, or offered for sale in such intrastate commerce shall be subject to the provisions of Section 4." As pointed out under Exceptions Nos. 1, 2, and 3 above, Section 4 of the Act by its express terms (with the single exception above noted) applies only to code members who, that section provides, must be producers. Clearly the words "coal sold, delivered, or offered for sale" as used in Section 4-A of the Act are intended to mean, and do mean, "coal sold, coal delivered for sale, or coal offered for sale" by the producer.

The Examiner states (Rep. p. 16):

"Congress intended to regulate not only the sale or other disposal, but also the distribution of bituminous coal in interstate commerce, and in intrastate commerce where such sale or other disposal and such distribution was found by the Commission to directly affect interstate commerce, and Congress provided for the control of matters and transactions directly affecting interstate commerce in such coal and transactions in coal in intrastate commerce in any manner, directly affecting interstate commerce. Insofar, therefore, as possible, the Congressional intent was to

regulate bituminous coal through actions relative thereto, to the furthest reaches of its jurisdictional limits."

It is submitted that the intent of Congress is best determined from the Act itself which, by its express terms, is limited and confined to the regulation of coal which is sold or the title thereto is otherwise transferred by the producer and to the distribution or other transactions in coal which is sold or the title thereto otherwise transferred by the producer.

502 The report of the Examiner (p. 16) refers at some length to the evil effects he conceives may result to interstate commerce in bituminous coal should Applicants be entitled to the exemption claimed by them. In this connection he states:

"* * * for if, through the use of such methods and contrivances, a few tons of coal can be mined, disposed of, distributed, and consumed, then there is no prohibition in the Act directed toward the regulation or control of the potential tonnage of every idle mine whose coal may be leased to a consumer and may be extracted by a third party for the consumer's sole and exclusive use. In view of the number of idle mines readily available for use and the relative ease with which such an evasive arrangement may be established, it must be considered that Congress contemplated such a practice and intended to forestall it. Certainly, it could not have intended that such a vast potential tonnage should, when mined and disposed of, be unregulated and exempt from the Act."

The above quoted extract from the Examiner's report states the sole ground upon which he seeks to support his finding that the transactions here involved "cause any undue or unreasonable advantage, preference, or prejudice as between intrastate commerce in coal on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal." It is therefore clear that the Examiner was unable to find and conclude that in any other manner or respect the transactions in the instant case directly and injuriously affect interstate commerce. His sole argument upon this point is that the exemption sought by Applicants, if granted, would deprive the Commission of the regu-

503 lation of a large tonnage of coal. The argument is, we submit, patently irrelevant and unsound. Congress has by the express provisions of Section 4 (1) of the Act excluded certain coal from the provisions of Section 4 and of the first paragraph of Section 4-A thereof. The effectiveness of such exclusion is not affected by the amount of actual or potential tonnage which is thus excluded. If, as Applicants contend and

assert, the coal produced at and transported from these three mines is not subject to Sections 4 and 4-A of the Act, the fact that a large potential tonnage produced under similar transactions may be unregulated and exempted from the Act in no way defeats or affects such right of exemption.

The gratuitous assumption that Congress intended or desired to regulate the production of coal which is owned in place, transported, and consumed by one and the same legal entity, is unwarranted by anything in the history of the Act or in its language. It is common knowledge that the purpose of the Act was to protect the commercial price structure in bituminous coal against competitive practices which depressed the earnings of labor and threatened operators with bankruptcy, and this purpose is made manifest in the preamble of the Act, which after divers recitals concludes that the regulation of prices and unfair methods of competition is necessary. There are no unfair methods of competition in the coal production involved in this proceeding because there is no competition, and there are no prices because there are no sales. The only tangible bases for

504 the Act are absent in the present case. It is impossible to find any basis for the Examiner's assertion that Congress intended to "forestall" the lease or purchase of "idle" mines by consumers. Whether the mines acquired are idle or busy, or are only potential, consumers of coal will acquire it in place and mine it themselves whenever the market price is, by governmental fiat or for economic reasons, sufficiently in excess of the cost of production to justify the shift, and no one in Congress or out has suggested that such an exercise of business judgment is in any sense against the public interest.

The Examiner asserts that Congress "certainly" could not have intended to leave unregulated "such a vast potential tonnage." This again makes clear the unwarranted basis of the Examiner's findings, for Congress not only could but did leave captive production unregulated. The assumption apparently is that the Act was adopted merely out of a desire to regulate as much as possible—just for the sake of regulation. It is perhaps unnecessary to reiterate the obvious—that what the Act regulates is the marketing of coal, commerce in coal, and not its physical production. Here, and in the cases of purchase of mines by consumers so feared by the Examiner, both the mine and the consumer are removed from the market. There is no Federal policy against industrial self-sufficiency, or plain efficiency, nor any social or economic principle which would require one to go into the market place for something which he already owns. To the extent that the coal is removed from an oversupplied general market, and the consumer, by mining his own coal, is no longer exerting

a downward pressure on commercial prices, the evils which Congress has sought to remedy by the Act are lessened or removed.

505 Expressions found in the Examiner's report indicate that he regards the transactions of Applicants with their respective contractors and the fee owners (Ex. 1 to 6, inclusive) as a device to evade or circumvent the National Bituminous Coal Act of 1937. Any such intent and purpose of these transactions is effectively negatived and refuted by the fact that they originated in the case of the William-Ann and Glamorgan Mines in 1934 and in the case of the Chilton Block No. 1 Mine in 1935, and were in effect long prior to the passage of the National Bituminous Coal Act of 1937. The evidence in the case upon this point is clear and uncontradicted. See Mr. Plummer's testimony (R., p. 57 and p. 66) in which he also stated that the plan pursuant to which the transactions here involved were effected was, prior to its adoption, submitted to and approved by the then N. R. A. Code authorities.

Exception No. 7

The Examiner erred in failing to find that for the purposes of the mining, removing, and loading of the coal involved in this proceeding the contractors employed by Applicants are, irrespective of their status as independent contractors, the agents of Applicants.

Exception No. 8

The Examiner erred in finding that Applicants are not "producers" of the coal at each of these three mines within the meaning and intent of the provisions of Section 4 (1) and or of the second paragraph of Section 4-A of the Bituminous Coal Act of 1937.

506 Exception No. 9

The Examiner erred in finding that to entitle a producer to exemption from the provisions of Section 4 of said Act such producer must be "engaged in the business of mining coal."

Exception No. 10

The Examiner erred (a) in finding that Applicants are not, in the case of the William-Ann Mine, located in Mingo County, West Virginia, and Chilton Block No. 1 Mine, located in Logan County, West Virginia, "engaged in the business of mining coal" in the State of West Virginia, and in finding, if his report be so

intended, that Applicants are not, in the case of the Glamorgan Mine, located in Wise County, Virginia, engaged in such business in the State of Virginia, and (b) in giving any consideration or weight in this proceeding to the question of the charter power of Seaboard Air Line Railway Company, or of the authority of Applicants, as its Receivers, to engage in the business of mining coal, or the question of whether or not Seaboard Air Line Railway Company or Applicants, as its Receivers, are licensed by the State of West Virginia to engage in the business of mining coal in that State.

The above stated Exceptions Nos. 7, 8, 9, and 10 all involve the important questions of whether or not Applicants are the "producers" of the coal at these three mines and are entitled under the express provisions of Section 4 (1) of the Act to the exemption claimed by Applicants. Because of their necessarily close relationship, these Exceptions are considered and discussed together.

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Exceptions Nos. 7 and 8

The Examiner finds (par. 3, page 13 of his report) as follows:

"It is further found that Daniel H. Pritchard and the Peerless Coal Corporation are independent contractors (Ex. 2, 12th par., Sec. 2, and Sec. 12, and Ex. 4, 6), and are not under the control or management of the Applicants in the mining and the removing and loading of said coal in the railroad cars as long as coal is produced and loaded safely and efficiently in the amount as required by the monthly and weekly tonnage instructions issued to the contractors by the Applicants; that said contractors, individually and apart from the control or management of said Applicants, pay the operating expenses of the said various mines, including maintenance and repair charges, pay rolls, personal property taxes levied and assessed against the mining machinery, tipples, and equipment, and Social Security taxes; and, independent of said Applicants, said contractors employ and discharge their said employees and arrange for the payment of workmen's compensation awards through the insurance carrier."

Based upon this finding by the Examiner, he further finds that the Receivers are not producers of the coal at these mines. In his finding that the contractors are independent contractors and that because of that relationship are not agents and hence Applicants are not the producers of the coal, the Examiner wholly misconceives and misinterprets the law upon this point. Under the principles conclusively established, in the transactions here involved in which the coal is owned by Applicants, is being

mined, removed, and loaded on railroad cars for Applicants, as between Applicants and the contractors, and irrespective of the status of the contractors as independent contractors, Applicants are the principals and the contractors are the agents of Applicants in such transactions, and this relationship of principal and agent is not affected by the lack of any control by Applicants over the conduct by the contractors of such operations.

In *Oliver Iron Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929, the United States Supreme Court passed upon the validity of the state occupational tax which was levied upon those engaged in the business of mining ore. Certain contentions were made by the taxpayer as to the constitutionality of the tax under the provisions of the Fourteenth Amendment to the United States Constitution and the uniformity provision of the State Constitution to the effect that the tax was illegal because it was imposed upon plaintiffs and not upon the contractors who performed the mining operations for them. In this connection the court said:

"One [contention of plaintiffs] is that the contractors who strip off the overburden of soil, gravel, etc., in open-pit mines, other contractors who load the ore in such mines into cars, and still others, usually four in a group, who take ore out of underground mines, are not included. *But none of these are engaged in mining on their own account. Instead, they are working for those who are so engaged. However important their service, they are not principals in the business, but employees; and their pay, whatever it be, is part of the expense of the business.* [Italics supplied.] Their omission has a reasonable basis."

In *Rothschild v. Northern Pacific R. Co.*, 68 Wash. 527, 123 Pac. 1011, the railroad delivered a car of freight to a transfer company, which had been employed by the plaintiff (consignee) to remove the contents of the car to his warehouse, the employees of the transfer company opened the doors of the freight car and before any unloading was done the contents burst into flames and were destroyed. Plaintiff brought suit against the railroad company to recover the value of the destroyed merchandise. He asserted that the transfer company was an independent contractor, and that a delivery of the consignment to it did not bind him, as it was not his agent. The Appellate Court found for the railroad company and used the following language (Brief, pp. 16, 17):

"The Court found that the Holman Transfer Company, whom the plaintiff appointed to receive the property, was an independent contractor, and it is argued that, because of this fact,

the relation of principal and agent did not obtain between the plaintiff and the transfer company, and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. *But we cannot accept this doctrine.* It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant, and consequently notice to it was notice to the plaintiff." [Italics ours.]

In *Galveston Causeway Construction Co. v. Galveston H. & S. A. Ry. Co.*, 284 F. 137 (D. C. S. D. Tex.), affirmed 287 F. 1021 (C. C. A. 5th), certiorari denied 262 U. S. 747, 43 S. Ct. 503, 67 L. Ed. 1212, the facts were that the contractor agreed to build a causeway for a group of railroads. Contractor's compensation was fixed at a definite sum. He failed to complete the work

for the contract price, and the railroads finished it at a cost far in excess of the price agreed upon. Before the railroads could file suit to recover from the contractor and his surety, the two latter filed a bill in equity to have the contract set aside on the ground that it was inequitable. The bill was dismissed by the court. It appears also that the complainants endeavored to show that the contract did not make the contractor an independent contractor, and he, being an agent, his principals could not recover for the additional cost of the work. In this case the District Court said (Brief, pp. 16, 17):

"I must advert briefly to the condition made so much of in complainants' brief that the contract did not make complainant an independent contractor, but merely an agent. Whether this is so or not it is unnecessary to decide, for there is no provision of law or of equity which prevents an agent from making an agreement to perform work upon a fixed compensation and upon a guaranteed cost."

Under the principle of the above-cited decisions it is clear that in the transactions here involved, and notwithstanding the status of the contractors as independent contractors, as between the contractors and Applicants, the relationship of principal and agent exists.

The following statements contained in *Restatement of the Law—Agency* (Volume 1, p. 9, et seq.) are in conformity with the principles enunciated in the above-cited decisions:

"'Principal' is a word used to describe a person who has authorized another to act on his account and subject to his control.

It includes, therefore, both a person who has directed another to act on his account in business dealings or to represent him in hearings or proceedings, but who has no control or right of control over the other's physical conduct, and also a person who employs another to act in his affairs, having such control or right to control over his conduct that the other is termed
 511 servant, whether or not he renders merely manual service.

The word 'master' as defined in Sec. 2 is not used in contrast with the word 'principal,' but as included within it. Thus, the owner of a business is a principal not only in regard to brokers who, as to their physical acts, are independent of his supervision, but also in regard to salesmen who conduct business transactions under supervision as to their conduct and who therefore come within the definition of servant, and likewise in regard to janitors whose jobs are confined to the performance of manual acts on the premises, under the owner's supervision. The word 'principal,' therefore, includes both persons who are masters and persons who are principals but not masters.

"Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants as described in Sec. 2, act in business dealings, and those who, being servants, perform manual labor. An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors. These are to be contrasted with others, such as clerks, train conductors, and other persons similarly employed, who are also agents, although they fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent as that word is used in the Restatement of this Subject if he is employed under such conditions that he becomes a servant. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant (see Secs. 219-255), and a master's duties to servants are different from those of a principal to agents who are not servants (see Secs. 472-528)."

Section 2 of the Restatement defines the terms "master," "servant," and "independent contractor." The comment to that section discusses the distinction between servants and agents
 512 who are not servants (see Secs. 472-528)."

"The word 'servant' is used in contrast to 'independent contractor,' a term which includes all persons who contract to do something for another and who are not servants with respect thereto. An agent who is not a servant is therefore an independent contractor when he contracts to act on account of the principal * * *. While an agent who contracts to act and is not a servant is therefore an independent contractor, not all independent contractors are agents. * * *. The word 'servant' is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from all other persons for whose physical conduct the employer is not responsible. These persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term 'independent contractor' is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible."

As above stated, the Examiner's finding that Applicants are not producers of the coal is based upon his erroneous assumption that the contractors in the transactions here involved are not agents of Applicants, and is in disregard of the fundamental principle of law that the act of the agent is the act of the principal. The Examiner's finding that Applicants are not the producers of the coal completely ignores and disregards the fact, abundantly established by the contracts in evidence in this case (Ex. 4, 5, and 6) and by the oral evidence adduced at the hearing (R., pp. 181, 182, 237, 238, 243, 244, 246), that the coal produced at these mines is the property of Applicants, is produced solely for their account and that Applicants, and not the contractors, are the motivating force in the production of such coal.

513 The case of *Oliver Iron Co. v. Lord*, supra, clearly supports our contention that Applicants are the producers of the coal at these three mines. The case of *Foss-Hughes Co. v. Lederer* (D. C. E. D. of Pa., 1919), 287 F. 150, also supports this contention of Applicants. In this last cited case, Act of October 3, 1917, Section 600 (Com. Stat., 1918, Comp. St. Ann., Sup. 1919, Section 6309-3 4A) provided for the collection of a tax on automobile trucks sold by manufacturer, producer, or importer thereof. The plaintiff, Foss-Hughes Company, brought suit to recover from Lederer, the Internal Revenue Collector, a tax levied upon it as a producer of motor trucks. Judgment was for the defendant. The facts were that the plaintiff purchased a chassis from a manufacturer thereof, and had a body attached by someone

doing that kind of work. Plaintiff performed no operations other than selling the completed truck. The court found that the manufacturers of body and chassis were each independent contractors. The court said:

"Unquestionably an automobile truck was produced. The maker of the chassis did not produce it, nor did the manufacturer of the body. One of the three parties concerned was the producer (if there was one), and he must be the plaintiff. The only escape from this conclusion is that no one of them was the producer, but it was a joint product of all. The taxpayer is one who both produces and sells. This plaintiff admittedly sells, and it is through it that what it sells is brought into existence. The fact that personally it does not make chassis or body, and does not even assemble, is not controlling—'facit per alium facit per se.' The fact that the maker of the chassis and the maker of the body is each what plaintiff calls an independent contractor is also aside from the mark."

514 We cannot but speculate upon the course the Commission will pursue when it establishes code prices, should it concur in the report of the Examiner and find Applicants are not producers. It seems to us in that event it must also find that the contractors are the producers, and as code members they must charge code prices. Such code prices must under the Act include not only the cost of mining and all incidental expenses in connection therewith, but also the value of the coal. The question immediately arises, could the contractors charge Applicants a price which includes the value of the coal owned by Applicants? May the Commission arbitrarily tell Applicants that their coal is worth so much, allow a deduction from the code price for its value as fixed by the Commission and lawfully require the Applicants to pay for their own coal for their own consumption the difference between such value and the code price? The answer is obvious. Imposition of the price provisions of the Code upon the coal produced at these mines would simply mean that the owner of coal is being required to dig it at a greater cost than is necessary—it would be a regulation or fixation of the cost of production rather than a control of commercial practices and prices.

Applicants submit that under the above-cited authorities and for the reasons above stated, it is clear that the Examiner erred in failing to find (a) that the contractors, irrespective of their status as independent contractors, are in the transactions here involved, as between themselves and the Applicants, the agents of Applicants, and (b) that Applicants are producers of the coal at each of the three mines.

The Examiner further erred in finding that to entitle the producer to exemption from the provisions of Section 4 of said Act such producer must be "engaged in the business of mining coal."

Applicants submit that the term "producer," as used in Section 17 (c) of the Act, is not all-inclusive. This is evident from the language of Section 17 (c) itself, which is that

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

The use of the term "includes" in this Section 17 (c) obviously excludes a construction that the definition of "producer" in this Section is all-embracing.

The word "producer," as used in Section 4 (1) of the Act, is of broader signification and is employed therein having reference to all of the provisions of the Act. The Act applies to the two following general classes of coal:

(i) Coal owned in place and after its extraction consumed by the same owner thereof.

(ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3—the tax provisions of the Act. Applicants submit that coal exempted by virtue of Section 4 (1) of the Act includes coal of the first above stated class which is produced either by the owner thereof

516 personally or through agencies or instrumentalities employed by such owner. Coal produced personally by the owner in place or through such agencies or instrumentalities is covered by Section 3—the tax provisions of the Act. In view thereof, clearly the intent of Section 4 (1) is to include in the exemption such owned coal produced through such agencies or instrumentalities. Such intent must be imputed to Congress; otherwise the application and operation of this exemption provision would be highly unjust, arbitrary and discriminatory, in that it would grant the exemption only to coal which is consumed by the owner thereof in place and produced personally by such owner, and would deny the exemption to coal owned in place and consumed by one and the same owner but produced by him through employed agencies or instrumentalities. No sound or just reason for such distinction exists.

The particular attention of the Commission is called to the cases of *Oliver Iron Co. v. Lord* and *Foss Hughes Co. v. Lederer*, supra, as supporting the above stated contentions of Applicants. The Examiner erred, therefore, in finding that to entitle a producer to exemption from the provisions of Section 4 of the Act such producer must be "engaged in the business of mining coal."

Exception No. 10

The Examiner erred (a) in finding that Applicants are not, in the case of the William-Ann Mine, located in Mingo County, West Virginia, and Chilton Block No. 1 Mine, located in Logan County, West Virginia, "engaged in the business of mining coal" in the State of West Virginia, and in finding, if

517 his report be so intended, that Applicants are not, in the case of the Glamorgan Mine, located in Wise County, Virginia, engaged in such business in the State of Virginia, and (b) in giving any consideration or weight in this proceeding to the questions of the charter power of Seaboard Air Line Railway Company, or of the authority of Applicants, as its Receivers, to engage in the business of mining coal, or the question of whether or not Seaboard Air Line Railway Company or Applicants, as its Receivers, are licensed by the State of West Virginia to engage in the business of mining coal in that State.

This finding is contrary to the decision of the United States Supreme Court in *Oliver Iron Co. v. Lord*, supra. In the *Oliver Iron Company Case* a tax was imposed under an Act of Minnesota upon those "engaged in the business of mining or producing iron ore or other ores" within the state. Plaintiffs attacked the validity of the Act because it did not apply to the contractors who extracted the ore, but the court held that such contractors were mere employees of the principals, and held such principals liable for the tax as persons engaged in the mining of iron ore in the state. There is no difference in principle between the *Oliver Iron Company case* and that of Applicants.

We submit that the Examiner should have been guided in reaching his conclusions by the evidences of actual operations of the Applicants in the State.

518 It is apparent that two things induced the conclusion here excerpted to: First, the supposed lack of corporate power in the Seaboard with the resultant incapacity of Applicants to act beyond the corporation's powers, and, second, the failure of Applicants to produce evidence of their license to engage in the business of mining at the hearing.

The Examiner concedes that the charter powers of a corporation may not be attacked in a collateral proceeding, but notwithstanding this he asserts it is proper to consider this lack of power for the purpose of determining whether the Applicants are engaged in such business. This completely ignores the rule and gives effect to what it prohibits. We dealt with this question in our Brief and demonstrated that governmental bodies have no more right to question the charter powers of a corporation collaterally than an individual has (Brief, p. 21). To fur-

ther bolster his erroneous conclusion that Applicants are not engaged in the business of mining coal in West Virginia, the Examiner points to failure of Applicants to produce a license from that State. Assuming, for the sake of argument (but expressly denying) that any license from the State of West Virginia to Applicants to engage in the business of mining coal in that State is required by law, as pointed out in Applicants' Brief (pp. 23, 24, and 25) the authority of Applicants, as Receivers, is not subject to attack in this proceeding and the lack of such license, assuming one to be required by law, in no sense justifies the finding by the Examiner or the Commission that Applicants are not engaged in the business of mining coal. It is a matter of

519 common knowledge that in many instances business is conducted without a state or city license. The failure of the conductor of such business to procure a license therefor does not alter the fact that he is engaged in the business, nor does it evidence the fact he is not engaged in business. We submit that the right of Applicants to come within the scope of Section 17(c) depends upon whether or not Applicants are, in fact, engaged in the business of mining coal. The following decisions so hold: *Three Forks Coal Co. v. United States*, 9 F. (2d) 946; *Sears, Roebuck & Co. Employees' Savings & Profit-Sharing Pension Fund v. Commissioner of Internal Revenue*, 45 F. (2d) 506. Applicants submit that the authorities cited in their Brief (pp. 18, 19, and 20) fully sustain their contention that they are so engaged. The case of *Adonique v. Carrien* (Ky.), 151 S. W. 921 (cited in Applicants' brief and herein again reviewed) seems particularly in point. This was an action for damages on the ground of negligence. Plaintiff brought suit against Annie L. Adonique, the defendant, who was a nonresident, and the Fidelity Trust Company, which was defendant's agent for the purpose of leasing Adonique's property, collecting the rents and looking after the property. Service of process was made upon the Trust Company. Adonique moved to quash the process on the ground that the Trust Company was not her agent for the service of process. Subsection 6 of Section 51 of the Civil Code of Kentucky provides:

"In actions against an individual residing in another state
 * * * engaged in business in this state, summons may be served upon the manager or person in charge of the business in the state * * *."

520 The question to be decided, therefore, was whether or not the defendant, Adonique, was engaged in the business of renting real estate in Kentucky. On this point the court said:

"In this case the defendant lives in St. Louis. She owned the property in question and other property in the city of Louisville.

The Fidelity Trust Company, as her agent, has charge of the property, and rents it, and collects the rents as they accrue. The defendant being engaged in the business of renting real estate in this state, and the cause of action growing out of the dangerous and defective condition of property thus rented, we conclude that she was engaged in business in this state within the meaning of the code provision, and that service of process on her agent, the Fidelity Trust Company, was sufficient to bring her before the court."

We direct attention to the fact that the court specifically says that Adonique was "engaged in the business of renting real estate," and to the fact that the Trust Company was an independent contractor. The Trust Company carried on its own particular business, acting for others as well as for Adonique, whereas the activities of the Applicants' contractors are confined solely to the performance of their duties to Applicants.

There are many decisions to the effect that a person or corporation acting through an agent, although such person or corporation is not within the state in which the activity is being carried on, is engaged in business therein, and that the activities of the agent are the activities of the principal.

The Examiner erred when he failed to find that Applicants are engaged in the business of mining coal in the State of Virginia within the meaning of Section 17 (c) of the Bituminous Coal Act.

We are unable to understand why the Examiner failed 521 to make a finding on this point since he deemed it necessary to make a finding with regard to Applicants' activities in West Virginia. We are justified, we submit, in concluding that the Examiner was of the opinion that Applicants are "engaged in the business of mining coal" in Virginia, and therefore he should have so found.

The reasons for Applicants' position that they are engaged in the business of mining coal within the meaning of Section 17 (c) of the Act have been discussed in connection with Applicants' West Virginia activities, so that they need not be repeated, but we submit that if the silence of the Examiner on this branch of the case means that Applicants are "engaged in the business of mining coal" in Virginia, it becomes evident that his finding with regard to Applicants' operations in West Virginia is based solely upon the supposed lack of charter power in the Seaboard Air Line Railway, and the consequent inability of the Applicants to act beyond such charter powers, and is in error.

All the evidence which the applicants introduced was in support of the allegations of their petition, and was not controverted. If there was evidence upon which to base the finding of the

Examiner regarding West Virginia operations, the same evidence was pertinent in connection with their Virginia operations, and accordingly the silence of the Examiner is significant of the fact that the Applicants are engaged in the business of mining coal in Virginia (R. pp. 170-171).

Exception No. 11

The Examiner erred in recommending that order be entered by the Commission in this proceeding to the effect that
 522 Applicants are not the producers of the coal within the meaning and intent of Section 4-A of the Act or within the meaning and intent of such term as used in subsection 4 (1) thereof, and in recommending that the exemption applied for by Applicants be denied.

Applicants have shown that there is no factual or legal basis for the above stated findings and recommendations of the Examiner. His findings, where considered by Applicants to be contrary to the law and the facts, have been shown to be erroneous, and authorities supporting Applicants' views and position are cited above.

Applicants submit that for the reasons, and upon the authorities, set forth in their foregoing Exceptions, the findings and conclusions of the Examiner are erroneous and incomplete to the extent stated in such Exceptions and that his report and recommendations should not be approved by the Commission. In view of the importance of the matters involved oral argument is requested.

Respectfully submitted,

W. R. C. COCKE,
 JOS. F. JOHNSTON,
 L. B. PLUMMER,
 W. H. DELANEY,

Counsel for Applicants.

NORFOLK, VIRGINIA, August 29, 1938.

523 I hereby certify that I have this day served a copy of the foregoing Exceptions and Brief upon all parties of record in this proceeding by mailing a copy thereof, properly addressed, to counsel of record for each party.

L. B. PLUMMER,
Counsel for Applicants.

Subscribed and sworn to before me this 29th day of August 1938.

G. R. GARRISON,
Notary Public.

My commission expires March 13, 1940.

525

UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION, WASHINGTON, D. C.

Docket No. 49-FD

IN the Matter of the SEABOARD AIR LINE RAILWAY COMPANY
APPLICATION FOR EXEMPTION UNDER SECTION 4, II (1) OF THE
BITUMINOUS COAL ACT OF 1937

*Notice of oral argument on exceptions taken to the examiner's
findings of fact and recommendations*

Notice is hereby given, That oral argument on the Exceptions taken to the Examiner's Findings of Fact and Recommendations in the above-entitled matter will be heard by the Director in the Hearing Room of the Bituminous Coal Division at the Walker Building, 734 Fifteenth Street NW., Washington, D. C., on August 22, 1939, commencing at the hour of 11:00 O'clock a. m.

Argument on behalf of any party shall not exceed sixty (60) minutes unless upon good cause shown the Director shall order otherwise.

Dated August 5, 1939.

(s) H. A. GRAY, *Director.*

526

Affidavit of service

CITY OF WASHINGTON,

District of Columbia, ss:

W. B. Roberts 3rd, employee of the Bituminous Coal Division of the Department of the Interior, being first duly sworn, on his oath deposes and says: That he served upon the Director of the Consumers' Counsel Division, upon the Secretaries of each of the District Boards (Registered Mail to District Board No. 8), upon each of the Statistical Bureaus of the Bituminous Coal Division, upon the Commissioner of Internal Revenue, and upon the applicant, Seaboard Air Line Railway Company (Registered Mail), a true and correct copy of a Notice entered in Docket No. 49-FD on August 5, 1939, true and correct copy of which is attached hereto and made a part hereof, by mailing it properly addressed with postage prepaid to the above named parties on August 7, 1939.

(Sgd.) W. B. ROBERTS 3rd.

Subscribed in my presence and sworn to before me this 14th day of August 1939.

[SEAL]

(Sgd.) IRENE L. WIESE.

Notary Public.

My Commission expires 12-1-41.

530 H. A. GRAY, ET AL., VS. LEIGH R. POWELL, JR., ET AL.

527 [Notice of oral argument on exceptions taken to the
Examiner's Findings of Fact and Recommendations,
omitted in printing.]

528

SEABOARD AIR LINE RAILWAY.

LAW DEPARTMENT,

Norfolk, Va., Aug. 10, 1939.

F-80710-B

BITUMINOUS COAL DIVISION,

United States Department of the Interior,

Washington, D. C.

GENTLEMEN: I have received with Director Gray's letter of August 7th copy of Notice that Oral Argument on Exceptions taken to the Examiner's Findings of Fact and Recommendations, which was entered in Docket No. 49-FD of your Division on August 5, 1939, in the matter of the Seaboard Air Line Railway Company application for exemption under Section 4, II (1) of the Bituminous Coal Act of 1937, will be heard on the 22nd instant.

The matters involved in this application are of considerable importance to the receivership estate of Seaboard Air Line Railway Company. Mr. Cooke, our General Counsel, Mr. Johnston, our Assistant General Counsel, and I desire to attend and, to the extent to be agreed upon and of the time to be allotted us, to participate in the oral argument. Unfortunately, all of us have previous important railroad business engagements at the time fixed by your Division for the argument and at various times during the remainder of August, in September and in the first week of October. During such period we must also devote considerable time to certain important pending financial and other matters affecting the receivership estate and which must be disposed of within such period.

For the reasons above stated, and also in view of the fact that our office staff is, of course, during the vacation season considerably depleted, we respectfully request that your Honorable Division postpone until some date after October 7th next the time for the hearing of the oral argument on the above-stated exceptions.

Your compliance with this request, which is regretfully but necessarily made, will be much appreciated.

Yours very truly,

(Sgd.) LEAVEN B. PLUMMER,

General Attorney.

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UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION, WASHINGTON, D. C.

Docket No. 49-FD

In the Matter of the SEABOARD AIR LINE RAILWAY COMPANY
APPLICATION FOR EXEMPTION UNDER SECTION 4, II (1) OF THE
BITUMINOUS COAL ACT OF 1937

*Notice of continuance of oral argument on exceptions taken to
examiner's findings of fact and recommendations*

Notice is hereby given, That oral argument on exceptions taken to the Examiner's Findings of Fact and Recommendation in the above entitled matter, heretofore noticed to be heard on the 22nd day of August 1939, in the Hearing Room of the Bituminous Coal Division, at the Walker Building, 734 15th Street NW., Washington, D. C., is, for good cause shown, continued to September 12, at the same place, and commencing at the hour of 11:00 a. m.

Dated August 15, 1939.

(s) H. A. GRAY, *Director.*

530

Affidavit of service

CITY OF WASHINGTON,

District of Columbia, ss:

W. B. Roberts 3rd, employee of the Bituminous Coal Division of the Department of the Interior, being first duly sworn, on his oath deposes and says: That he served upon the Director of the Consumers' Counsel Division, upon the Secretaries of each of the District Boards, upon each of the Statistical Bureaus of the Bituminous Coal Division, upon the applicant, Seaboard Air Line Railway Company, and upon W. C. Shunk, President, Peerless Coal Corporation, Glamorgan, Virginia, a true and correct copy of a Notice of Continuance of Oral Argument on Exceptions taken to Examiner's Findings of Fact and Recommendations entered in Docket No. 49-FD on August 15, 1939, true and correct copy of which is attached hereto and made a part hereof, by mailing it properly addressed with postage prepaid to the above-named parties on August 16, 1939.

(s) W. B. ROBERTS 3rd.

Subscribed in my presence and sworn to before me this 25th day of August 1939.

[SEAL]

(s) IRENE L. WIESE,
Notary Public.

My commission expires 12/1/41.

532 H. A. GRAY, ET AL., VS. LEIGH R. POWELL, JR., ET AL.

531 UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION, WASHINGTON, D. C.

Docket No. 49-FD

In the Matter of the Application of the RECEIVERS OF THE
SEABOARD AIR LINE RAILWAY COMPANY FOR EXEMPTION

Order denying application for exemption

The Receivers of the Seaboard Air Line Railway Company having filed an application with the National Bituminous Coal Commission on August 4, 1937, in accordance with the provisions of Section 4-A of the Bituminous Coal Act of 1937, requesting exemption under Section 4, II (1) thereof, on the ground that Applicants are the producers of coal.

The Director having considered the application, the evidence and testimony and the entire record in this proceeding and, upon the basis thereof, having made findings of fact and conclusions, a copy of which is now on file at the Office of the Division in Washington;

IT IS ORDERED, That the exemption requested in the application of the Receivers of the Seaboard Air Line Railway Company be and the same is hereby denied.

Dated: June 14, 1940.

H. A. Gray
DIRECTOR

532

UNITED STATES DEPARTMENT OF THE INTERIOR

BITUMINOUS COAL DIVISION, WASHINGTON, D. C.

Docket No. 49-FD

In the Matter of the Application of the RECEIVERS OF THE
SEABOARD AIR LINE RAILWAY COMPANY FOR EXEMPTION

Findings of fact, conclusions, and opinion of the Director

This is a proceeding instituted upon the application filed with the National Bituminous Coal Commission (the "Commission")

on August 4, 1937 by the Receivers of the Seaboard Air Line Railway Company (the "Applicants") in accordance with the provisions of Section 4-A of the Bituminous Coal Act of 1937 (the "Act"), requesting exemption under Section 4, II (1).

The coal in question, which is consumed by Applicants, is mined by Daniel H. Pritchard and Peerless Coal Company from three mines leased by Applicants, namely, the William Ann and Chilton Block No. 1 mines in West Virginia and the Glarvorgan mine in Virginia. Applicants contend that such coal is, "in each case, coal owned by and the property of Applicants, is coal consumed by Applicants and is coal which is shipped by said individuals, acting for and as the agent of Applicants, to Applicants for use and consumption by Applicants in their operation of said railroads and properties", and that Applicants are the producers of such coal. Applicants therefore urge that, "the said coal produced at each of said three mines and the transactions and commerce in said coal, are, under and by virtue of the provisions of Section 4 (1) of the Act, specifically exempted from all of the provisions of Section 4 of said Act." Applicants further claim that, "the provisions of Section 4 of said Act have no application to Applicants, or to the coal produced from said mines, or any thereof, or to the transactions and commerce in said coal, in that said Section 4 relates and applies only to coal which is sold or the title to which is otherwise transferred, and to transactions and commerce in coal which involve the sale or other transfer of the title to said coal."

Pursuant to orders of the Commission, a hearing upon the application was held on September 22 and 23, 1937, in the hearing room of the Commission in the Washington Hotel, Washington, D. C., before Examiner T. B. Cantrell. At the hearing all interested parties were given full opportunity to appear and be heard and examine and cross-examine witnesses. Appearances were entered by counsel for the Commission, for Applicant, and for District Board No. 8. Following the conclusion of the hearing a brief was filed by counsel for Applicants. The Examiner submitted proposed findings of fact and conclusions and recommended denial of the exemption in his report filed December 7, 1937, and on August 30, 1938, Applicants filed exceptions to said report and a brief in support thereof. Pursuant to notices dated August 5, 1939, and August 15, 1939, oral argument on the exceptions was heard on September 12, 1939, by the Director of the Bituminous Coal Division of the United States Department of the Interior, successor to the Commission.

The cause now having come on for consideration, the Director

No. —

In the Supreme Court of the United States

OCTOBER TERM, 1910

M. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. TUCKER, AS SECRETARY OF THE
INTERIOR, PETITIONERS

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF STAFFORD AIR LINE RAILWAY
COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. —

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES AS SECRETARY OF THE
INTERIOR, PETITIONERS

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT

The Solicitor General, on behalf of the Bituminous Coal Division, of the Department of the Interior, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above case on September 26, 1940, reversing and setting aside an order of the Director of the Division denying a petition of Leigh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard

Air Line Railway Company, for exemption from the regulatory provisions of the Bituminous Coal Act of 1937.

OPINIONS BELOW

The findings, conclusions, and opinion of the Director of the Bituminous Coal Division may be found at R. 1-32.¹ The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 114 F. (2d) 752.

JURISDICTION

The decree of the United States Circuit Court of Appeals sought to be reviewed was entered on September 26, 1940. The jurisdiction of this Court is invoked under Sections 239 and 240 of the Judicial Code, as amended, and Sections 4-A and 6 (b) of the Bituminous Coal Act of 1937.

QUESTIONS PRESENTED

1. Whether coal consumed by a person who leases mineral rights to coal lands and simultaneously, in a related agreement, contracts with a coal producer to mine the coal, the latter assuming, and indemnifying the consumer against, all the liabilities, burdens, and risks attendant upon the coal-mining business, is "consumed by the producer"

¹ The typewritten transcript of the entire record is on file with the Clerk of this Court. The parties have stipulated that for purposes of this petition only the Appendix to petitioner's brief in the court below and the proceedings below need be printed.

within the meaning of the exemption contained in Section 4 II (1) of the Bituminous Coal Act of 1937.

2. Whether the Director's finding that coal produced under the above circumstances is not exempt from the Act is supported by substantial evidence.

3. Whether the court below erred in treating the issue as to whether respondents were producers of coal as a matter of law, and in failing to give any weight to the Director's ultimate finding of fact that respondents were not producers.

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72-91, U. S. C. Supp. V, Title 15, secs. 828-851. The provisions of the Act primarily involved are:

SEC. 4 II (1). The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

SEC. 17. As used in this Act—

* * * * *

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

STATEMENT

Pursuant to Section 4-A of the Bituminous Coal Act of 1937 respondents, the Receivers for the Seaboard Air Line Railway Company, applied to the

Director of the Bituminous Coal Division of the Department of the Interior for exemption from the regulatory provisions of the Act for themselves and for certain coal from three mines which they claimed that they operated, on the ground that the coal was "consumed by the producer" within the meaning of Section 4 II (1) (R. 33-38).

The facts are fully set forth in the Director's findings and opinion (R. 1-32). Since the facts as to each of the three mines are substantially the same it will be necessary to describe here only the circumstances relating to one of them—the Chilton Block No. 1 Mine.

In July 1935 the Chilton Block Coal Company was the lessee of a tract of coal land in West Virginia, known as the Chilton Block No. 1 Mine (R. 15). The president of the Company was Daniel H. Pritchard (R. 20). On July 5, 1935, the Chilton Block Company offered to grant respondents, in return for a royalty of 10 cents per ton, the right to extract coal from the mine, conditional on acceptance by respondents of an offer simultaneously made by Pritchard to mine the coal and deliver it to respondents for a specified compensation ² (R.

² The original contracts and leases for the William-Ann and Glamorgan mines, the other two mines here involved, were made in May and July 1934 (R. 3, 5, 11, 12), when N. R. A. code prices were in effect. The original contract and lease for the Chilton Block mine were made in July 1935, after the invalidation of the National Industrial Recovery Act, but while the bill which became the Bitumi-

15-17). The company offered to grant to Pritchard, apparently without compensation, the right to use all of its equipment and machinery in performance of the mining operations. The offer to sublease the mineral rights provided that the lease should terminate simultaneously with the agreement with Pritchard (R. 16).⁴

Pritchard's offer to mine the coal was in turn conditional upon acquisition by respondents of the mineral rights (R. 17). He offered to mine the coal either on a cost-plus basis or at a fixed price of \$1.15 per ton, subject to modification in case of

nous Coal Conservation Act of 1935 (H. R. 8429, 74th Cong., 1st Sess.) was pending in Congress. During the entire period in which the contracts were made and renewed, price-fixing legislation has either been in effect or pending in Congress.

There was an express finding that the lease and contract for the William-Ann mine, upon which the contracts for the other mines were modeled, were entered into in order to enable respondents to purchase below N. R. A. code prices (R. 11). The William-Ann lease and contract were extended for periods of three weeks or less when the *Carter Coal* decision was pending and also while new price legislation was pending in Congress, so that respondents could decide whether to renew them (R. 5).

⁴ The contract to operate the William-Ann mine was also made with Pritchard, who owned stock in the mine; the mine was then being operated by his brother (R. 11). Pritchard had leased the William-Ann mining property himself for a long term, to begin on the expiration of the lease to respondents (R. 11). The lease of the Glamorgan mine was from Glamorgan Coal Lands Corporation; the contract to mine was originally made with Glamorgan Coals, Inc., and then transferred to Peerless Coal Corporation (R. 11-15).

fluctuation in the cost of materials, wages, or taxes (R. 17, 56, 68-70). Pritchard was to deliver coal, on cars at the mine, in the amounts respondents ordered (R. 21-22). He was to acquire at his own expense the mining machinery and equipment (R. 17). An agreement was to be made embodying, in addition to the above, principal terms and conditions which may be summarized as follows: *

(a) The contractor (Pritchard) is to provide all the labor, materials and supplies and perform all the work necessary to the mining of the coal (R. 6).

(b) The contractor will at his own expense maintain and *manage* such organization as is necessary to the performance of the contract (R. 6).

(c) The contractor will assume and perform all of the obligations of the respondents to the landowner except the payment of royalties (R. 7).⁵

(d) The contractor will maintain, at his sole expense, all necessary kinds of insurance on the property (R. 8).

(e) The contractor will bear, and indemnify respondents against, all risks incident to the work to be performed, in-

* The offer provided that the agreement should embody the same terms and conditions as were contained in an agreement previously entered into between respondents and Pritchard to operate the William-Ann Mine (R. 17).

⁵ The contract made for the William-Ann Mine provided that respondents were to pay taxes on the land (R. 7), but the lease for the Chilton Block Mine expressly provided that the contractors were to pay such taxes (R. 16).

cluding particularly losses for injury to persons and property, taxes on the mine and its equipment, fines, penalties, liens, claims of other liability, and attorneys' fees (R. 8-10).

(f) Respondents may terminate the contract at any time that they are able to purchase coal on the open market at a price lower than the amount to be paid the contractor plus the royalties to the lessor, unless the contractor reduces the amount he is to receive so as to enable the respondents to buy at the market price (R. 20).

(g) The coal may be inspected at the mine by respondents' inspectors, and respondents are required to pay only for coal of the requisite quality and grade (R. 49).

(h) All the coal produced is to be consumed by respondents except a small portion sold to the contractor's employees (R. 21).

(i) The agreement specifically provides that (R. 63):

"The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence or omissions of the Contractor, his agents, servants, employees or representatives."

The offers made by the Chilton Block Company and Pritchard were accepted by respondents on July 9, 1935 (R. 16, 18). The original agreements

were to run for a year with option to renew, and with minor modifications the agreements have been continued in effect since that time (R. 18-19).

In the operations under the contract, the respondents advise the contractor periodically as to how much coal is desired and the contractor loads the coal into cars and orders the cars shipped to any point respondents request (R. 21-22). Invoices are submitted to respondents and payments made to the lessor and contractor on a monthly basis (R. 23, 59-60). The shipments from the mines to points of destination are generally made across state lines (R. 23).

On the basis of the above facts (similar findings being made as to the other mines), the Director found that respondents were not the producers of the coal mined from the three leased properties (R. 24), and that the contractual arrangements "were intended as a flexible contrivance by means of which the Receivers hoped to establish themselves as nominal producers of the coal consumed by them and thereby escape the price provisions of coal legislation, including the Act." His opinion states (R. 29):

* * * The transaction has the aspects of an ordinary commercial sale and, indeed, it appears that Applicants stand in a position not materially different from that of any large consumer who dominates a small source of supply or who has contracted for the total product of a given manufacturing

enterprise or tract of land. In every real sense, with respect to the supply of coal obtained from these contractors, Applicants have not become a "producer" but have rather left their "consumer" position and mobility unchanged. This mobility is demonstrated quite pointedly by the contract provisions permitting Applicants to terminate the contract if they can obtain coal in the open market at a lower price than under the present arrangement, provided that the contractors do not reduce their compensation sufficient to meet the market price. The leases are terminable upon termination of the contracts.

He concluded that the transactions in coal covered by the application for exemption are subject to the regulatory provisions of the Act and that the exemption sought should be denied.*

*The Circuit Court of Appeals, overlooking the fact that respondents had applied for exemption for the coal produced and the "transactions and commerce in said coal" (R. 38), as well as for themselves personally, thought it "anomalous" for the Division to hold that respondents were not a producer for purposes of exemption, and yet still subject to the Act. But Sections 4 II (1) and 4-A provide only for the exemption of "coal" and "commerce in coal," not of producers personally, and it is clear from the Director's opinion that he held only the "transactions" in the coal involved to be subject to the Act, not the respondents (R. 32). The Director's position, as set forth in the brief below (p. 23), was and is "that petitioners are not the 'producer' of the coal for any purpose of the Act, whether it be the taxing, pricing, or other provisions."

Respondents filed a petition to review in the Circuit Court of Appeals for the Fourth Circuit. That court reversed the Director's decision, holding that it was unsupported by substantial evidence and based upon error in law.

SPECIFICATION OF ERRORS TO BE USED

The court below erred:

1. In holding that the Director's order denying exemption is based upon error of law and is not supported by substantial evidence;

2. In holding that respondents are the "producer" of the coal in question and that such coal is exempt under Section 4 II (1) of the Bituminous Coal Act of 1937;

3. In holding that the issue whether petitioners are producers within the meaning of the exemption provision in Section 4 II (1) of the Act presents a question of law for the court to decide for itself, and in failing to give any weight to the Director's determination that respondents are not the "producer" of the coal.

REASONS FOR GRANTING THE WRIT

I

The case is important to the administration of the Bituminous Coal Act because the decision below approves a device through which any large consumer can purchase coal at prices below those established under the Act.

The contracts involved here were all entered into and renewed during a period when federal minimum price regulations were in effect or when legislation to reestablish such regulation was pending (*supra*, pp. 4-5). In order to escape from such regulation (R. 5, 11, 24-25), respondents arranged to pay 9 or 10 cents a ton royalty, under a contract of lease, to the owner of the land or mineral rights, and the remainder of the price of the coal to a mine operator engaged under a contract as an independent contractor. Respondents were to exercise no more control over the operations of the mine than would any large consumer. They merely told the contractor-producer how much coal to produce and where to send it, inspected it for quality, and paid an amount specified by contract. The contractor assumed all the risks of the enterprise; respondents could reject coal which did not meet their specifications; and the lease as well as the contract to operate the mine could be terminated whenever respondents could purchase coal more cheaply elsewhere. This method of acquir-

² The contractor even assumed all of respondents' obligations to the landowner except for the payment of royalties, and, as to one of the three mines, the payment of taxes on the land.

Respondents assert that they bear certain risks inasmuch as the amount paid the contractor fluctuates with the cost of materials, labor, and taxes. Since similar provisions are frequently contained in ordinary contracts of sale, the assumption of "risk" to this extent does not distinguish respondents from ordinary purchasers.

ing coal differs from the usual practice only in that the purchaser pays the royalty to the landowner directly instead of indirectly through the mine operator.

Clearly this arrangement differs only in form, and not in substance, from the ordinary purchase of coal. It can be availed of by any producing company with counsel astute enough to shuffle royalty and mining contracts so as to make one corporation, or corporate official, the party to a lease of the coal rights, and an affiliated corporation, or different official, a party to the contract to mine the coal. If the decision below is not reversed, any consumer large enough to purchase the entire output of a mine will be able, without assuming any of the additional responsibilities or burdens incident to entry into the coal mining business, to procure coal at prices lower than those established under the Act. Such a result would, of course, be inconsistent with the underlying purpose of Congress to establish an effective means of discouraging competitive abuses in the industry. Cf. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 395.

The language of the Act permits of no such construction. Section 4 II (1) exempts coal "consumed by the producer". "Producer" is defined in Section 17 (c) as including all individuals, corporations, etc., "engaged in the business of mining coal." The facts outlined above demonstrate that not respondents but the independent contractors

here are engaged in the business of mining coal.* Respondents are not producers unless any owner of property who permits an independent contractor to perform work and services on his property is himself to be regarded as engaged in the same business as the contractor. But a landowner who engages a contractor to build a house on his land is not from that fact alone engaged in the building business.⁹

The court below rejected the argument that "producer" in the statute meant only the contractor "engaged in the business of mining coal" on the theory that the maxim *qui facit per alium, facit per se* made the act of the contractor the act of respondents. That familiar maxim is intended to

* It is the Government's position that the contractors, not respondents, are the "producers" subject to the Act. The royalty paid directly to the lessors would, however, be a part of the price paid for the coal for purposes of compliance with the minimum price orders.

⁹ The *Restatement of the Law of Agency* (American Law Institute), Section 2, Comment b, p. 13, declares:

* * * Thus, one who contracts for a stipulated price to build a house for another who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control as to his conduct.

See, also, *H. M. Rowe Co. v. Tax Commission*, 149 Md. 251, 261, 131 Atl. 509, 512-513; *People v. Horn Silver Mining Co.*, 105 N. Y. 76, 11 N. E. 155, affirmed, 143 U. S. 305; *Commonwealth v. Williamsport Rail Company*, 250 Pa. 596, 95 Atl. 795; *People ex rel. Jewellers Circular Pub. Co. v. Roberts*, 155 N. Y. 1, 49 N. E. 248.

describe the relation of principal and agent or master and servant. A contractor is an agent only if acting in a fiduciary capacity and subject to the control of the principal in matters of some detail.¹⁰ But the contract in the instant case, expressly and designedly, negatives the existence of any such relationship or liability. Respondents, indemnified against all liability, only give directions as to the end to be achieved, not as to the means by which that end is accomplished.¹¹ The relationship between the parties is obviously not fiduciary. Under these circumstances the acts of the contractor are not the acts of respondents, and respondents are not engaged in the business of mining coal.

The court below also held that the Act was intended to apply only to sales and transfers of title, and that, since there was no formal sale here, the

¹⁰ *Restatement of the Law of Agency*, Sections 2 (and Comment), 220; *Mechem, Agency*, Sections 40, 1870-1871; 2 C. J. S., 1027-1028; *Casement v. Brown*, 148 U. S. 615, 622; *Standard Oil Co. v. Anderson*, 212 U. S. 215, 221-222; *Chicago, Rock Island & Pacific Ry. Co. v. Road*, 240 U. S. 449; *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 520-521.

¹¹ *Mechem, Agency* (2d ed., 1914), Section 40, states that an agent is "to be distinguished from the 'independent contractor,' who is one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it."

Act could not be operative. But the Act is not limited to sales. It expressly applies to coal "sold or delivered" (Section 4 II (e)). Code membership may be revoked if coal is "sold or otherwise disposed of" in violation of the code. Similar expressions showing that the Act is not restricted in its scope to technical sales are found throughout the statute.¹² In *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 393, this Court noted that the regulatory provisions of the Act are applicable to "sales or transactions" in or affecting interstate commerce. Presumably the word "sale" was supplemented by more general language in order to prevent evasion of the Act by just such devices as are here employed.¹³

¹² Section 1 ("regulation of the sale and distribution"); Section 3 (a) ("sale or other disposal"); Section 3 (b) ("sale or other disposal," "disposed of by sale," "disposed of otherwise than by sale," "sale or disposal"); Section 3 (d) ("disposed of otherwise than by sale"); Section 4 ("the code * * * shall be applicable only to matters and transactions in or directly affecting interstate commerce"); Section 4 II (e) ("sold or delivered or offered for sale"); Section 4-A ("transactions in coal," "sold, delivered or offered for sale"); Section 5 (b) ("sold or otherwise disposed of," "if disposed of otherwise than by sale," "sale or other disposal"); Section 5 (c) ("if disposed of otherwise than by sale," "sold or disposed of").

¹³ See *Dayton Brass Castings Co. v. Gilligan*, 267 Fed. 872, 877-878 (S. D. Ohio), affirmed, 277 Fed. 227 (C. C. A. 6th), certiorari denied, 258 U. S. 619. Cf. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 605.

The court below assumed the existence of a general congressional intention to exclude *all* "captive" mines from the operation of the Act, and also that the mines in question are captive mines. In support of this assumed congressional intention, the court quoted testimony of the Chairman of the former Coal Commission before a Senate committee, indicating his opinion that the bill then under consideration did not embrace captive coal within its pricing provisions.¹⁴ Captive coal is a general term which is not found in the 1937 Coal Act, although it was defined in the earlier bill before the Senate committee and in the 1935 Act.¹⁵

The court below assumed that there could be no price upon which the Act could operate if there were no sale. But the Act can apply to the consideration paid the contractor and lessor, regardless of what is called.

¹⁴ The hearings quoted by the court below related to an earlier draft of the bill which contained neither Section 4 II (d) itself nor any similar provision. They were held in June, 1936, in connection with S. 4668, 74th Cong., 2d Sess., which was substantially the same, in so far as provision relevant here are concerned, as the Bituminous Coal Conservation Act of 1935, invalidated the previous month. *Carter v. Carter Coal Co.*, 298 U. S. 238. This bill failed to pass the 74th Congress. Bills on the same subject, though slightly changed, were introduced in the 75th Congress (S. 1, H. R. 4985). Section 4 II (d) first appeared in H. R. 4985, 75th Cong. See H. Rept. 294, 75th Cong., 1st Sess., p. 6.

¹⁵ The Bituminous Coal Conservation Act of 1935 did contain a definition of "captive" coal, but this was not for purposes of exemption, but in order to provide a basis for determining the amount of tax payable under Section 3 of that Act (49 Stat. 1008, Section 19). That definition would not have included the present arrangement.

Section 4 II (1) itself, is the only manifestation of a legislative intention to exempt any captive coal from the 1937 Act, and its legislative history demonstrates clearly that it was not designed to apply to all captive situations.¹⁶ That section applies only to coal consumed by the producer,¹⁷ as defined in the Act, and as we have shown, *supra*, pp. 12 *et seq.*, respondent's coal does not come within that category.

II

The court below exercised its own independent judgment as to whether or not respondents were a "producer" within the meaning of the Act, without giving any weight to the Director's findings and decision. This treatment of the question presented as one of law for the court to determine without reference to the administrative decision conflicts in principle with the decisions of this Court in *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177; *Rochester Tel. Corp. v. United States*, 304 U. S. 125, and *South Chicago Coal & Dock Co.*

¹⁶ The 1935 Act defined captive mines as including coal produced by "a subsidiary or affiliate" (49 Stat. 1008). An amendment, which would have extended Section 4 II (1) to such relationships, passed the Senate (81 Cong. Rec. 3136), but was eliminated from the Coal Act of 1937 in conference (H. Rept. 578, 75th Cong., 1st Sess., pp. 1, 8).

¹⁷ Where the same person is both producer and consumer, regulation of transactions (whether or not "sales") between "them" would be both impossible and meaningless. Section 4 II (1) was intended to cover that type of situation, and there is no indication in legislative history that it had any broader purpose.

v. *Bassett*, 309 U. S. 251. See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 400.

In this case, as in the *Shields* and *South Chicago* cases, there was no dispute as to the primary facts. The issue in the *Shields* case was whether on undisputed facts a railroad was an "interurban" within the meaning of the Railway Labor Act, and in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act. Here the question is whether a person is a "producer" within the meaning of the Bituminous Coal Act. In the *Shields* case this Court declared that the "determination" as to whether the carrier was an interurban "was one of fact" (305 U. S., at 181). In the *South Chicago* case the Court concluded that whether an employee was a member of a crew was not "a question of law" (309 U. S., at 258). And in the *Rochester Telephone* case the Court declared that whether one company obtained "control" of another within the meaning of the Communications Act presented "an issue of fact" (307 U. S., at 145).

In each of the cases cited it was recognized, whatever might be the classification of comparable issues as between judge and jury, that the question of ultimate fact as to whether a person came within particular statutory language was a matter of judgment on which the decision of the adminis-

trative official was to be accepted, if supported by evidence in the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review. This Court has already indicated that this principle applies to proceedings for exemptions under the Bituminous Coal Act, and that view was adopted by the Circuit Court of Appeals for the Eighth Circuit, in the *Sunshine Anthracite* litigation.¹⁸ In its opinion in the *Sunshine* case this Court, citing the *Shields* case, referred to "the determination of the *question of fact* whether a particular coal producer fell within the Act" (310 U. S., at 400). (Italics supplied.)

It is apparent from the opinion below that the Circuit Court of Appeals in this case, regarding the issue presented as one of law,¹⁹ failed to give the slightest weight to the decision of the Director. The court completely disregarded the principle that "The judicial function is exhausted when there is found to be a rational basis for the con-

¹⁸ *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *Sunshine Anthracite Coal Co. v. National Bituminous Coal Commission*, 105 F. (2d) 559, certiorari denied, 308 U. S. 664.

¹⁹ The court below also stated that the Director's finding was "not supported by substantial evidence." It is clear from the statement at the beginning of the opinion that "there is no question as to the facts of the case," as well as from the entire discussion, that this was merely a formal finding, and that the court, regarding the issue as one of law, gave no weight to the Director's conclusion and judgment.

clusions approved by the administrative body." *Rochester Tel. Corp. v. United States*, *supra*, at 146; *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 303.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit should be granted.

FRANCIS BIDDLE,
Solicitor General.

ABE FORTAS,
General Counsel,
Bituminous Coal Division,
Department of the Interior.

NOVEMBER 1940.

No. 603

In the Supreme Court of the United States
OCTOBER TERM, 1940

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE IN-
TERIOR, PETITIONERS

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON, AS
RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 603

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE IN-
TERIOR, PETITIONERS

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON, AS
RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The findings, conclusions, and opinion of the Director of the Bituminous Coal Division may be found at R. 532. The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 573-580) is reported in 114 F. (2d) 752.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on September 26, 1940 (R. 581). The jurisdiction of this Court rests upon Sections 239 and 240 of the Judicial Code, as amended, and Sections 4-A and 6 (b) of the Bituminous Coal Act of 1937.

QUESTIONS PRESENTED

A railroad leased the mineral rights to coal lands. At the same time, in an interrelated and dependent agreement, it made a contract with a coal producer pursuant to which the coal producer was to mine the coal and was to assume, and indemnify the railroad against, all liabilities, burdens, and risks attendant upon the coal mining business. The issue is whether coal mined from these lands by the coal producer, and consumed by the railroad is "consumed by the producer" within the meaning of the exemption contained in Section 4 II (1) of the Bituminous Coal Act of 1937. Resolution of this issue involves the following questions:

1. Is the Director's determination that under the above circumstances the coal is not consumed by the producer binding upon the courts if supported by substantial evidence?

2. If so, is the Director's finding supported by substantial evidence?

3. If not, did the court below err in holding as a matter of law that respondents were both producers and consumers of the coal in question?

STATUTE INVOLVED

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72-91, U. S. C. Supp. V, Title 15, secs. 828-851. The provisions of the Act primarily involved are:

SEC. 4 II (1). The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

SEC. 17. As used in this Act—

* * * * *

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

Copies of the entire Act will be handed to the Court on the argument.

STATEMENT

Pursuant to Section 4-A of the Bituminous Coal Act of 1937, respondents, the receivers for the Seaboard Air Line Railway Company, applied to the Director of the Bituminous Coal Division of the Department of the Interior for exemption from the regulatory provisions of the Act for certain coal from three mines which they claimed that they operated, on the ground that the coal was "consumed by the producer" within the meaning of Section 4 II (1) (R. 1-4).

A hearing was held before an examiner, evidence was introduced, an examiner's report issued recommending denial of the application for exemption,

exceptions and a brief were filed by respondents, and oral argument was heard by the Director (R. 533). The facts, as disclosed by the evidence and as summarized in the Director's findings and opinion, are not in dispute.

The coal for which exemption is sought is consumed by the railroad (R. 545; 2). This coal is mined by Daniel H. Pritchard and the Peerless Coal Mining Company from three mines leased by the respondents, namely, the William-Ann and Chilton Block No. 1 mines in West Virginia and the Glamorgan mine in Virginia (R. 533; 2). Since the facts as to each of the three mines are substantially the same, it will be necessary to describe here only the circumstances relating to one of them—the Chilton Block No. 1 Mine.

In July 1935 the Chilton Block Coal Company was the lessee of a tract of coal land (R. 541; 242). The president of the company was Daniel H. Pritchard (R. 544; 126, 131); Pritchard was a coal producer engaged in the commercial operation of several mines (R. 544; 27, 129), and his wife owned a controlling stock interest in the Chilton Block Company (R. 126). On July 5, 1935, the Chilton Block Company offered to assign to respondents, in return for a royalty of 10 cents per ton, the right to extract coal from the mine, conditional on acceptance by respondents of an offer simultaneously made by Pritchard to mine the coal and deliver it to respondents for a specified compensation (R. 541-542; 242-243). The company offered to grant

to Pritchard, apparently without compensation, the right to use all of its equipment and machinery in performance of the mining operations (R. 542; 243). The offer to sublease the mineral rights provided that the lease should terminate simultaneously with the termination of the agreement with Pritchard (R. 542; 243).¹

Pritchard's offer to mine the coal was in turn conditional upon acquisition by respondents of the mineral rights (R. 542; 324). He offered to mine the coal either on a cost-plus basis or at a fixed price of \$1.15 per ton, subject to modification in case of fluctuation in the cost of materials, wages, or taxes (R. 542-543; 325). Pritchard was to deliver coal, on cars at the mine, in the amounts respondents ordered (R. 542-543; 325). He was to acquire at

¹The contract to operate the William-Ann mine was also made with Pritchard, who owned stock in and was sales agent for, and whose brothers managed the William-Ann Company, which had previously operated the William-Ann mine under lease (R. 536, 539; 64-65, 69). On the same day that the respondents leased the William-Ann mine and contracted with Pritchard to operate it, Pritchard, in order to induce the lessors to make a short-term lease with respondents, entered into a lease for the same property for 30 years to begin immediately upon the termination of the lease to respondents (R. 539; 133-141, 383-426). The lease of the Glamorgan mine was from the Glamorgan Coal Lands Corporation; the contract to operate the mine was originally made with Glamorgan Coals, Inc., which owned the machinery and equipment in the mine (R. 539, 540; 30). The contract with Glamorgan Coals, Inc., was subsequently transferred to Peerless Coal Corporation (R. 540; 31-33).

his own expense the mining machinery and equipment (R. 543; 325). An agreement was to be made embodying, in addition to the above, the following terms and conditions:²

(a) The contractor (Pritchard) is to provide all the labor, materials and supplies and perform all the work necessary to the mining of the coal (R. 536; 296).

(b) The contractor will at his own expense maintain and *manage* such organization as is necessary to the performance of the contract (R. 536; 296).

(c) The contractor will assume and perform all of the obligations of the respondents to the landowner except the payment of royalties (R. 536; 297).³

(d) The contractor will maintain, at his sole expense, all the necessary insurance on the property (R. 537; 297-298).

(e) The contractor will bear, and indemnify respondents against, all risks incident to the work to be performed, including particularly losses for injury to persons and property, taxes on the mine and its equip-

² The offer provided that the agreement should embody the same terms and conditions as were contained in an agreement previously entered into between respondents and Pritchard to operate the William-Ann mine (R. 542; 326).

³ The contract made for the William-Ann mine provided that respondents were to pay taxes on the land (R. 536; 297), but the contracts for the Chilton Block and Glamorgan mines expressly provided that the contractors were to relieve respondents of liability to pay even such taxes (R. 541, 542; 243, 261, 327).

ment, fines, penalties, lien claims of other liability, and attorneys' fees (R. 537-538; 298-299).

(f) Respondents may terminate the contract at any time that they are able to purchase coal on the open market at a price lower than the amount to be paid the contractor plus the royalties to the lessor, unless the contractor reduces the amount he is to receive so as to enable the respondents to buy at the market price (R. 544-545; 327).

(g) The coal may be inspected at the mine by respondents' inspectors, and respondents are required to pay only for coal of the requisite quality and grade (R. 545; 295).

(h) All the coal produced is to be consumed by respondents except a small portion sold to the contractor's employees (R. 545; 301).

(i) The agreement specifically provides that (R. 304):

"The relation of the Contractor to the Receivers under or by virtue of this agreement is solely the relation of an independent contractor, and the Contractor, as such independent contractor, shall be solely responsible for all the acts, negligence or omissions of the Contractor, his agents, servants, employees or representatives."

The offers made by the Chilton Block Company and Pritchard were accepted by respondents on July 9, 1925 (R. 543; 328). The original agreements were to run for a year with option to renew, and with minor modifications the agreements have

been continued in effect since that time (R. 543-544; 27-28, 242-243, 238-239, 235, 324-325, 319-320, 313-314).

In the operations under the contract, the respondents advise the contractor periodically as to how much coal is desired and the contractor loads the coal into cars and orders the cars shipped to any point respondents request (R. 545; 108). Invoices are submitted to respondents and payments made to the lessor and contractor on a monthly basis (R. 546; 109, 112). The coal from the mines is shipped to respondents by connecting carriers, generally across state lines, and is consumed on respondents' railroad from Virginia to Florida (R. 545-546; 47, 111, 119, 123).

The original contracts and leases for the William-Ann and Glamorgan mines, the other two mines here involved, were made in May and July 1934 (R. 534, 539; 163, 205, 256, 293), when N. R. A. code prices were in effect. The Director expressly found, upon the basis of affirmative evidence, that the lease and contract for the William-Ann mine, upon which the contracts for the other mines were modeled, were entered into in order to enable respondents to purchase below N. R. A. code prices (R. 539; 39, 59, 137). The William-Ann lease and contract were extended for periods of three weeks or less while the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, was under submission, expressly for the purpose of awaiting that decision and also while new price legislation was pending in Congress, so that respondents could decide whether to

renew them (R. 535; 55-56, 202, 287-291). The original contract and lease for the Chilton Block mine were made in July 1935 (R. 242-244, 324), after the invalidation of the National Industrial Recovery Act, but while the bill which became the Bituminous Coal Conservation Act of 1935 (H. R. 8429, 74th Cong., 1st Sess.) was pending in Congress. During the entire period in which the contracts were made and renewed, price-fixing legislation has either been in effect or pending in Congress.

On the basis of the above facts, the Director found that respondents were not the producers of the coal mined from the three leased properties (R. 549), since they participate in no way in the mining process, exercise no control over the contractor, and have assumed none of the risks, liabilities or burdens of a person engaged in the mining business. The contractual arrangements, he concluded, "were intended as a flexible contrivance by means of which the Receivers hoped to establish themselves as nominal producers of the coal consumed by them and thereby escape the price-provisions of coal legislation, including the Act." (R. 547). His opinion states (R. 549-550):

* * * The transaction has the aspects of an ordinary commercial sale and, indeed, it appears that Applicants stand in a position not materially different from that of any large consumer who dominates a small source of supply or who has contracted for the total product of a given manufacturing enterprise or tract of land. In every real

sense, with respect to the supply of coal obtained from these contractors, Applicants have not become a "producer" but have rather left their "consumer" position and mobility unchanged. This mobility is demonstrated quite pointedly by the contract provisions permitting Applicants to terminate the contract if they can obtain coal in the open market at a lower price than under the present arrangement, provided that the contractors do not reduce their compensation sufficient to meet the market price. The leases are terminable upon termination of the contracts.

Accordingly, the Director held that the transactions in coal covered by the application for exemption are subject to the regulatory provisions of the Act and that the exemption sought should be denied.*

* The Circuit Court of Appeals, overlooking the fact that respondents had applied for exemption for the coal produced and the "transactions and commerce in said coal" (R. 577), as well as for themselves personally, thought it "anomalous" for the Division to hold that respondents were not a producer for purposes of exemption, and yet still subject to the Act. But Sections 4 H (1) and 4-A provide only for the exemption of "coal" and "commerce in coal," not of producers personally, and it is clear from the Director's opinion that he held only the "transactions" in the coal involved to be subject to the Act, not the respondents (R. 552). The Director's position, as set forth in his brief below (p. 23), was and is "that petitioners are not the 'producer' of the coal for any purpose of the Act, whether it be the taxing, pricing, or other provisions." Since the independent contractors are the real producers of the coal, the Act operates affirmatively upon them, not upon respondents.

Respondents filed a petition to review in the Circuit Court of Appeals for the Fourth Circuit (R. 555-561). That court reversed the Director's decision, holding that it was unsupported by substantial evidence and based upon error in law (R. 573-580).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Director's order denying exemption is based upon error of law and is not supported by substantial evidence;

2. In holding that respondents are the "producer" of the coal in question and that such coal is exempt under Section 4 II (1) of the Bituminous Coal Act of 1937;

3. In holding that the issue whether respondents are producers within the meaning of the exemption provision in Section 4 II (1) of the Act presents a question of law for the court to decide for itself, and in failing to give any weight to the Director's determination that respondents are not the "producer" of the coal.

SUMMARY OF ARGUMENT

I

A. The court below, treating the question here involved as one of law, made its own independent determination as to whether respondents were producers within the meaning of the Bituminous Coal Act. This holding is inconsistent with *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, *Roches-*

ter Telephone Corp. v. United States, 307 U. S. 125, and *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, in each of which the Court recognized that the question of whether particular facts brought a person within statutory language was one upon which the judgment of the administrative agency was to be accepted if supported by evidence in the record.

This conclusion need not be based upon the traditional but artificial separation of administrative determinations into questions of fact and of law. Cases involving the application of statutory language almost inevitably require the consideration of both factual and legal problems, with final judgment dependent upon the interplay of both. The establishment by Congress of an expert administrative agency with authority to determine a particular question manifests a legislative intention that the determination of the agency be accepted as to all the factors which enter into the formulation of judgment. Such a body of specialists is better equipped than the courts to pass upon issues requiring an intimate knowledge of the background and purposes of a statute and of the practical consequences of a particular construction. On such matters, as well as upon those which are purely factual, the rule should be applied that "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146.

B. The Director's determination that respondents are not producers of the coal they consume is supported by substantial evidence. Respondents differ from the ordinary consumer only in that they hold leases on the coal lands and pay royalties directly to the lessor. In view of the fact that they are not otherwise engaged in, and that they bear none of the risks of, the mining business, the single fact that they pay two persons instead of one for their coal is insufficient to make them producers within the meaning of the Act. The complex arrangements into which they have entered amount to no more than a device to protect themselves against increases in the price of coal resulting from price-fixing legislation.

II

The express terms of the Act establish that respondents are not producers of the coal which they consume. Section 17 (c) defines producer as a person "engaged in the business of mining coal." The facts here show that the independent contractors, not the respondents, are engaged in the coal mining business. A person who contracts with an independent contractor to perform work on his property is not, by reason of that fact alone, engaged in the business of the contractor.

The construction of the statute which the Director adopted is essential if the purposes of the Act are to be achieved. The Act was designed to prevent the abuses of cut-throat competition in the

coal industry by the stabilization of prices. The device employed by respondents, if sanctioned, would permit such competition to continue unabated through the mere use of a different form of contract. The facts of this case show that otherwise independent producers can readily be converted into independent contractors for the purpose of evading minimum prices.

The contractor's acts are not attributable to respondents on any theory of agency. Under the most orthodox common law tests, the contractors, who are not subject to respondents' control or supervision and are not empowered to bind respondents in dealing with third persons or to subject them to the burdens and liabilities of the coal mining business, are not respondents' agents. In any event, the question here is one of statutory construction, not to be resolved by the technicalities of the law of agency. Congress certainly did not intend that, through the application of so-called common law principles, Section 4 II (1) should become an instrument for destroying the remainder of the Act.

III

There is no substance to the argument that the Act is unconstitutional as applied in this case because it regulates royalties and the compensation for services rather than interstate prices. These factors are only affected by the regulation because they are essential ingredients of the interstate price. Constitutional power is not restricted by

any technical definition of price found in the law of sales.

ARGUMENT

The court below paid lip service to the statutory mandate that the Director's decision is binding if supported by substantial evidence (R. 580). But in truth it made its own independent determination as to whether respondents were a "producer" within the meaning of the Bituminous Coal Act. The opinion makes it clear that no weight whatever was given the Director's findings or determination and that the court proceeded on the assumption that whether or not respondents were a "producer" was wholly a matter of law, for the independent determination of the court (R. 580).

We urge, first, that the question was for the primary determination of the Director, and that the court below should have affirmed his decision since it was supported by substantial evidence. In the second place, even if the issue be viewed as one for the courts independently of the Director, we urge that the court below erred as a matter of law in ruling that the respondents were a "producer" within the meaning of the Act.

I

THE DIRECTOR'S DETERMINATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS THEREFORE CONCLUSIVE

A. The Director's determination if supported by substantial evidence is conclusive

1. *The authorities.*—The present question does not differ in nature from those considered in

Shields v. Utah Idaho Central R. Co., 305 U. S. 177, *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, and *Rochester Telephone Corp. v. United States*, 307 U. S. 125. See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 400. The issue in the *Shields* case was whether on undisputed facts a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act; and in the *Rochester Telephone* case whether one company was under the "control" of another within the meaning of the Communications Act.

In each of the cases cited, this Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment on which the decision of the administrative official was to be accepted, if supported by evidence in the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review. In the *Shields* case this Court declared that the "determination" as to whether the carrier was an interurban "was one of fact" (305 U. S. at 181). In the *South Chicago* case the Court refused to treat the issue of whether an employee was a member of a crew as presenting a mere question of law (309 U. S. at 258). And in the *Rochester Telephone* case the Court declared that whether

one company had obtained "control" of another within the meaning of the Communications Act presented "an issue of fact" (307 U. S. at 145). In its opinion in the *Sunshine* case this Court, citing the *Shields* case, indicated that this principle applies to proceedings for exemptions under the Bituminous Coal Act; it referred to "the determination of the *question of fact* whether a particular coal producer fell within the Act" (310 U. S. at 400). (Italics supplied.)

Whether a person is a "producer" of coal presents the same type of issue as those considered in the cases just described. The action of the court below in treating the issue as one of law, without regard to the findings of the administrative agency, is in obvious conflict with the principles underlying those decisions.

Respondents urge that the issue must be one of law because the facts are undisputed. But this was also true in the cases cited. In each the determination as to status under a statute was dependent upon the application of judgment to substantially undisputed facts. As this Court stated in *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320:

* * * the court below, in substituting its judgment as to the existence of preference for that of the Commission *on the ground that where there was no dispute as to the facts it had a right to do so*, obviously exerted an authority not conferred upon it

by the statute. * * * It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action. (Italics supplied.)

2. *The principles of judicial review.*—The same answer is required if one goes back of the rulings of this Court and undertakes to build from basic principles a criterion by which to determine those questions which are primarily for administrative determination, and those which are subject to an independent examination by the reviewing court.

This case involves no question of constitutional jurisdiction, nor any other question of constitutional right. Whatever, then, may be the force of cases such as *Crowell v. Benson*, 285 U. S. 22, or *St. Joseph Stockyards Co. v. United States*, 298 U. S. 38, they have no application here. The scope of review is simply a question of Congressional intent.

Section 6 (b) of the Bituminous Coal Act provides for judicial review of the Commission's order, and declares that "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." This declaration enacts the traditional formula used to demarcate the functions of administrative agency and reviewing court: questions of "fact" are primarily for administrative determination and questions of "law" are subject to independent examination by the

court. The same phrasing of the principle of delineation would be adopted even had Congress been silent. See *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, 185. Congress, then, has indicated its intention as to the scope of judicial review simply by declaring that the decisions of the Director should be subject to the judicial review customarily accorded administrative determinations but to no more.

If this traditional criterion of "law" or "fact" be applied to the present case, the issue must be regarded as one of "fact" within the decisions of this Court which have been discussed above.

But the formula, if applied literally, is likely to beg the question at least as often as it answers it. Its simplicity is engaging, but it obscures rather than clarifies the essential elements of the problem.⁵ First, it is advanced as a sovereign talisman for situations so dissimilar as the relationships between (a) judge and jury, (b) appellate and trial court, and (c) reviewing court and administrative agency. Second, it deals in absolute terms with a question which is always one of degree; the cate-

⁵ There have been frequent comments upon the inadequacy of the fact and law test. See Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (1927), pp. 54 *et seq.*; McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1933), pp. 25 *et seq.*; Isaacs, *The Law and the Facts*, 22 Col. L. Rev. 1; Landis, *Administrative Law and the Courts*, 47 Yale L. J. 519, 531-532; Cooper, *Administrative Justice and the Rule of Discretion*, 47 Yale L. J. 577, 588-590.

gory of "mixed law and fact" questions reflects this inadequacy but does not solve it. See *e. g.*, *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 547; *Bates & Guild Co. v. Payne*, 194 U. S. 106, 109. Every case, in other words, involves both questions of law and of fact, and any attempt to separate an issue into exclusive categories of "law" or of "fact" is certain to prove fruitless when both categories are present.

Any unflinching literalism in use of the traditional formula would confuse the real problem: the delineation of the functions of the various instrumentalities for adjudication—judge and jury, administrative body and reviewing court, trial and appellate tribunal—so as to carry out the underlying legislative intention and to effect sound administration of the law. As between administrative body and reviewing court, this delineation must be made by determining the tribunal which Congress, in view of the qualifications of the respective adjudicatory bodies, must be supposed to have intended to invest with primary authority for decision.

For example, with respect to an administrative ruling such as that here in issue, involving the applicability of statutory language to particular facts, the person called upon to make the determination is faced with the task of (1) finding specific or evidentiary facts, (2) ascertaining the intention of Congress from the language of the Act, its legislative history, purposes, and structure, and (3) in the

light of these considerations, drawing an ultimate inference or conclusion as to whether the facts found come within the scope of the statute. In this type of situation, where final judgment necessarily depends upon the interplay of both factual and legal considerations, the "fact" or "law" criterion, developed for the division of functions between experienced judge and inexperienced jurors, is both inappropriate and impossible of literal application. The controlling factor, we believe, should be that the administrative tribunal is more, rather than less, expert than the judge, not only in the solution of factual problems arising in its specialized field, but also in its familiarity with the background and purposes of the statute and with the practical consequences which will ensue from any particular construction. The establishment by Congress of an administrative agency with authority to determine a particular question manifests a legislative intention to take advantage of the expert judgment of a body "informed by experience" in the designated field. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454.

Decision of the instant case, for example, requires a background knowledge of the manner in which the coal industry operates and of the activities customarily carried on by coal producers on the one hand and by consumers on the other. Determination of who is a producer for purposes of the exemption provision necessitates an under-

standing of the dynamics of the coal industry and an appreciation of the many different ways in which coal may be translated from a mineral in the ground to a fuel in the consumers' burners. It requires, in addition to a knowledge of the general purposes of Congress in passing the Coal Act, an understanding of the industrial details which led Congress to grant the particular exemption contained in Section 4 II (1). It requires the ability to foretell the effect of the method of acquiring coal here adopted upon the attainment of this objective. It is, in short, a matter in which the "feel of judgment" is peculiarly important. *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 366. Such a determination, we submit, is one which should be made by an expert administrative body equipped to bring together all of the inter-related fragments of the picture, and not by a court, experienced in the law generally but without intimate grasp of the industrial and economic details which make up the coal industry and form the background of the Coal Act.

For these reasons, when Congress authorizes an administrative agency to decide a question, it should be assumed that Congress intends that the matter be submitted to the judgment and discretion of a trained group of specialists rather than to a court; insofar as a determination of the question calls for the exercise of judgment and discretion, the administrative decision should be accepted by the

courts irrespective of whether based on facts in evidence or on familiarity with the legislative and practical setting of the particular statutory provision involved.

This does not mean that the conclusions of an administrative body are final on one type of question any more than on the other. The determination of the administrative body must have "warrant in the record" (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146) and a reasonable basis in the law. Just as an administrative decision which is unsupported by substantial evidence has no rational basis in fact, so too an administrative ruling which is plainly unreasonable in the light of express statutory language or other convincing evidence of legislative intention has no foundation in law.⁶ For either vice, administrative action may be set aside. But in either event, we submit, "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Mississippi Valley Barge Line Co.*

⁶ Thus, if the language of the statute or its legislative history manifests a specific legislative intention as applied to a particular state of facts, it would be arbitrary for an administrative body to give the statute a different meaning. But if legislative intention appears only in broad outline without reference to a specific state of facts, there would be legitimate room for administrative discretion in determining whether the Act applied in a particular situation.

v. *United States*, 292 U. S. 282, 286-287; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 303.

Under such a test, which we believe conforms to the intention of Congress in delegating power to administrative agencies and to the actual practice of this Court in many of the cases cited, the courts will not be required artificially to characterize a problem, which inevitably has both aspects, as either "fact" or "law." They will rather give due weight to the trained judgment of the administrative bodies on all matters with respect to which they have the advantage of specialized experience. Only when an administrative determination has no basis in substantial evidence, or is arbitrary and capricious, will it be overruled.

This approach was adopted in one of the earliest cases involving judicial review of administrative rulings. In *Bates & Guild Co. v. Payne*, 194 U. S. 106, in passing upon a decision of the Postmaster General, this Court said (p. 108):

* * * where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. * * * where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where

the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive.

This recognition of the importance of the administrative judgment was translated into the settled doctrine of primary jurisdiction of the administrative agency over all questions involving technical judgment. See *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 139, and cases cited. Its breadth may be illustrated by two recent decisions of this Court. In *Tank Car Corp. v. Terminal Co.*, 308 U. S. 422, 433, the Court held that although the District Court had jurisdiction over a suit for damages, the existence of "an administrative problem" required the District Court to stay "its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act." Similarly, in *Armour & Co. v. Alton R. Co.*, No. 293, present Term, the Court accepted the argument that the "complex transportation problems" presented required submission of both legal and factual questions to the Interstate Commerce Commission. This implicit recognition that administrative judgment must be applied to both legal and factual issues because of their interrelation would be futile if the courts subsequently, on the assumption that segregation of the "legal" issues were possible, were independently to exercise their own judgment on the ultimate conclusion.

B. *The Director's determination is supported by substantial evidence*

The term "producer" is defined in Section 17 (c) of the Act as including "all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."⁷ Typically, a producer or a person engaged in the business of mining coal operates equipment which he owns or rents; hires a crew of men who extract the coal from the ground and prepare and load it for shipment; directs and supervises work at the mine; is financially responsible for the work and welfare of the miners; and bears the expenses and risks of the enterprise. The producer either owns the coal mine or leases the right to extract the coal, paying a royalty to the landowner or a prior lessor.⁸ In either case he ships the coal to a consumer in return for the payment of a specified sum.

The typical consumer orders coal from a mine operator, specifying the amount desired, the dates of shipment and the point of destination. He normally specifies, in addition, the quality of coal desired and inspects the coal to see if it conforms to the specification. He pays the mine operator a sum agreed upon in a contract. He consumes the coal.

⁷ The "business of mining" ore has been described by this Court as consisting "in severing it from its natural bed and bringing it to the surface * * *." *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 177.

⁸ Hunt, Tryon, and Willis, *What the Coal Commission Found* (1925), p. 91.

It is not difficult to see where respondents fit into this picture. They lease the right to extract coal from certain mines and pay royalties to the lessor. They tell an operator or operating company how much coal they desire to have shipped to them during a particular period, and name the point of destination (R. 108-109). They have the right to inspect the coal for quality before it is shipped and to reject any coal that does not meet their specifications (R. 104-105, 184, 295). They pay the operator a certain amount per ton in accordance with the terms of the contract. They consume the coal.

Respondents do not extract the coal from the ground themselves or hire the miners who do extract it. They do not direct or give any instructions to the persons who do the hiring. They do not pay the men. They do not supervise the work in any manner, even in its broadest aspects. They do not designate the portion of the mine where work is to be performed, determine the amount of coal to be taken from any particular section of the mine, or prescribe the method of mining. They do not own, rent, or operate the mining machinery or equipment. They do not purchase supplies, or direct what supplies shall be purchased. They do not load the coal into cars or supervise the loading (R. 57, 96, 112, 131-132). They are not financially responsible to the miners or to third persons for losses resulting from the mining operations. They do not pay for insurance, workmen's compensa-

tion, taxes, or penalties. They have carefully immunized themselves against all of the risks of the business of mining coal.⁹ Each of the above functions is performed by the independent contractors who, by vocation, are coal producers on their own behalf.

These facts show that respondents differ from the typical consumer only in that they held leases on the coal lands and pay royalties directly to the lessor. Even in this respect, they occupy a position which is in no way comparable to that of a typical coal producer, for the mineral rights which they have secured involve no investment risk whatever. They have neither invested funds in the purchase of coal-bearing lands¹⁰ nor have they entered into any leases imposing upon them contractual obligations which would prove burdensome in the event of a declining market. This is so de-

⁹ Respondents assert that they bear certain risks and burdens because the amount which they must pay the contractors for the service performed may fluctuate with the cost of materials, labor, and taxes. The contracts also allow respondents the option of paying on a "cost-plus" basis. But payment by a purchaser for what he obtains and adjustment of the price on a "cost-plus" basis do not convert the purchaser into a producer. Such provisions frequently occur in ordinary contracts of sale without affecting the nature of the relationship between the parties. See *United States v. Driscoll*, 96 U. S. 421; *Kruse v. Revelson*, 115 Ohio St. 594; Note, 55 A. L. R. 291.

¹⁰ In this connection it is significant that the necessary improvements in the William-Ann mine were to be made by Pritchard rather than by respondents (R. 303), and that Pritchard was to put the Chilton mine in serviceable condition at his own expense (R. 325-326).

spite the provision requiring the payment of minimum royalties, because the leases are terminable upon the termination of the operating contracts, and the operating contracts are terminable whenever respondents can obtain coal in the open market at a lower price than the aggregate amount payable to the contractor and the lessor. It is evident, therefore, that a decline in the price of coal, which would normally have an adverse effect upon a coal producer, whether he operates property which he owns or which he leases, cannot have such an effect upon the respondents. To the contrary, respondents, like all other consumers, would be directly benefited by any decline in the market price and, in fact, would be in a better position than most consumers to take advantage of such a decline because they would not be bound by contracts requiring them to buy specific amounts of coal at a specified price for a particular period.

In no realistic sense, therefore, can the fact that respondents are lessees of the coal mined by the contractors be considered as putting them in a different position than the typical consumer. Respondents are simply consumers who pay for the coal and its production separately instead of paying one person for both. The complex arrangement into which they have entered amounts to no more than a device to protect themselves against any increase in the price of coal, whether brought about by a price-fixing statute or otherwise. It can be availed of by any producer and consumer

seeking to contract with each other at prices below those fixed under the Act, by the mere formality of making the consumer rather than the producer the lessee of the mining rights.¹¹

In these circumstances, we believe it manifest that the Director correctly concluded that respondents are not the producers of the coal which they consume and that the scheme which they evolved was merely "a flexible contrivance" by which they sought to establish themselves as "nominal producers" and thereby escape the price provisions of the Act.¹² See pp. 33-37, *infra*. Certainly it cannot be said that there is no "rational basis" for this conclusion. Cf. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, at 146; *Mississippi Valley Barge Line v. Co. v. United States*, 292 U. S. 282, 286-287.

¹¹ While this subterfuge would for obvious reasons be resorted to by large consumers, the device would be equally available to small consumers. Any consumer could lease from the landowner the right to extract a specified amount of coal and contract with the coal operator to pay him separately for extracting and shipping that amount. Since this case was decided below, the Bituminous Coal Division has received several applications for exemption on the same ground as that involved in the present case. One of these applications relates to a contract for only 6,200 tons of coal. *Application of Morgantown Glassware Guild*, No. 1463 FD, filed October 16, 1940.

¹² Cf. *United States v. San Francisco*, 310 U. S. 16, 28, where this Court stated: "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law."

II

THE DIRECTOR'S DETERMINATION WAS NOT ERROREOUS
IN POINT OF LAW

1. *The language of the Act.* Section 4 II (1) exempts coal "consumed by the producer". "Producer" is defined in Section 17 (c) as including all individuals, corporations, etc., "engaged in the business of mining coal." The facts outlined in the preceding pages demonstrate that it is the independent contractors, not the respondents, who are engaged in the business of mining coal. Respondents are not producers unless any owner of property who contracts with an independent contractor to have work and services performed on his property is himself to be regarded as engaged in the business of the contractor. But a landowner who engages a contractor to build a house on his land is not by reason of that fact alone engaged in the building business. See *Restatement of the Law of Agency*, Sec. 2, comment b, p. 13, quoted *infra*, p. 41.

Cases arising under other statutes hold that the owner of a product who procures another to turn it into a usable article is not himself the manufacturer or producer. In *People v. Horn Silver Mining Co.*, 105 N. Y. 76, affirmed, 142 U. S. 305, the New York Court of Appeals held that a silver mining company which turned over its bullion to an assay office to be refined and then returned to it was not engaged in manufacturing, saying (p. 82):

* * * It was no more a manufacturer than a farmer is who takes his grain to the grist-mill to be ground into flour for a part of the grain or a money compensation, or who takes his wool to a cloth manufacturer to be made into cloth for a compensation, and then to be returned to him.

In *H. M. Rowe Company v. Tax Commission*, 149 Md. 251, 261, the Maryland Court of Appeals rejected the contention that the owner and writer of a manuscript who paid another to print books from it was himself engaged in printing and manufacturing. The court declared that it would be

* * * strained and unnatural * * * to hold that one who procures the products which he markets to be manufactured by another, not his agent, manufactures them himself. * * * it nowhere appears in this case that the persons who did the actual work of manufacturing the appellant's product were its agents, but on the contrary it appears that they were independent contractors.

See also *Commonwealth v. Williamsport Rail Co.*, 250 Pa. 596; *People ex rel. Jewellers Circular Pub. Co. v. Roberts*, 155 N. Y. 1.

These cases indicate that even if respondents be treated as *bona fide* owners of the coal-bearing land,¹³ they would not be producers of coal merely because they owned the property and received the coal for consumption after it was mined.

¹³ See note 21, p. 43, *infra*.

Respondents attack our reliance on the statutory definition of producer as a person "engaged in the business of mining coal" on the ground that the use of the word "includes" shows that the definition was not intended to be exclusive. The statute declares (Sec. 17 (c)):

The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

But at most only the list of "individuals, firms, associations, corporations, trustees, and receivers" is subject to supplementation, not the phrase "engaged in the business of mining coal." This is made clear, if it be otherwise doubtful, by Section 9 of the Act, which deals with labor practices of "producers," and by Section 10 (a), which requires "producers" to maintain "a uniform system of accounting of costs, wages, operations," etc. These provisions are, of course, applicable only to those actually engaged in mining coal; persons in the position of respondents have no control whatever over labor practices and have no power to maintain a uniform system of accounts for the mining operations. Indeed, it is difficult to imagine why, in the light of the purposes of the Act (see pp. 34-37, *infra*), Congress would have intended the term "producer" to cover persons not engaged in the coal mining business.

2. *The effect of the decision below upon the operation of the Act.* The construction of the statute

which the Director adopted is essential if the evils at which the Act is directed are to be remedied. "It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 395. The "demoralized price structures" resulted from an excess of capacity and a consequent struggle among producers to dispose of their coal, even at prices far below cost of production.¹⁴ The result of this situation was a "buyers' market"—a condition allowing powerful consumers of bituminous coal progressively to depress prices by taking advantage of the acute competition among producers. As this Court noted in *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 363-364.

* * * The District Court found that organized buying agencies, and large consumers purchasing substantial tonnages, "constitute unfavorable forces." "The highly organized and concentrated buying power which they control and the great abundance of coal available have contributed to make the market for coal a buyers' market for many years past."

¹⁴ The "chaotic conditions" in the coal industry preceding the passage of this legislation are described in the documents cited in this Court's opinion in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 395.

The underlying purpose of Congress in passing the Bituminous Coal Act was to counterbalance this power of consumers and to remedy the abuses of cut-throat competition through the establishment of minimum prices. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 396. Yet the device here involved, if sanctioned, would permit consumer pressure and producer competition to continue unabated. Only the use of a different form of contract would be necessary. Consumers, instead of shopping around for coal at ruinous prices, would acquire leases and then bargain with producers for their services as independent contractors. And producers, instead of competing for the sale of coal at ruinous prices, would have to compete for the sale of their skill and organizations at prices still depressed by the oversupply of the market. Hence, consumers could again acquire coal at dictated prices, free from the restrictions of the statute, and producers would be obliged to continue their cut-throat competition, "price" competition simply being supplanted by competition for "compensation under contract." Here as in *United States v. San Francisco*, 310 U. S. 16, 26, "to limit the prohibitions of * * * the Act narrowly to sales * * * without more would permit evasion and frustration of the purpose of the lawmakers."

Indeed, if it be held that the Act may be circumvented by so simple a device, the resulting situation in the bituminous coal industry might

well become worse than it was under open competition. The producers who resist the lure of these arrangements and operate under the statute will be subjected to a new and unfair form of pressure from persons who have managed to escape from the restrictions of price regulation. This pressure will grow as the demand for coal on the open market declines in proportion to the increase in the amount obtained from the "independent contractor" producer. Producers capitulating to the pressure to become "independent contractors" will be tied indefinitely to powerful consumers. Their independence and mobility, and their ability to search for industrial consumers willing to pay a fair price for their coal, will be substantially impaired.

That otherwise independent producers could thus be converted into independent "contractors" for the purpose of evading minimum prices is vividly illustrated by the present case. The record shows that the independent contractors here are coal producers in their own right, operating other mines commercially (R. 27, 96, 129); that one of the contractors (Pritchard) had an interest in the company which previously operated the William-Ann mine under lease (R. 69) and that he himself has a lease on the mine which runs from the termination of respondents' lease (R. 133-141, 383-426); and that the same contractor is himself president and, with his wife, is in control of the producing company which assigned the lease of the Chilton Block mine to respondents (R. 126).

The record also shows, as the Director found, that the contracts were entered into in order to obtain prices lower than those established under the N. R. A. coal code and that they were extended from time to time with an eye to subsequent price-fixing legislation (R. 59, 202, 291).

It is fundamental that statutes are to be construed in the light of the purposes sought to be achieved and of the evils sought to be remedied. *United States v. San Francisco*, *supra*; *Helvering v. Hammel*, No. 49, present Term; *United States v. American Trucking Associations*, 310 U. S. 534, 543, and cases cited; *Rhodes v. Iowa*, 170 U. S. 412, 422; *Federal Trade Commission v. Western Meat Company*, 272 U. S. 554, 559. This Court has held that it will give to the Coal Act a construction "which will preserve the vitality of the Act" and not one under which "its effectiveness would be seriously impaired." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 392. Since the Act is a remedial one, its exemptions are to be strictly construed so as to harmonize and not conflict with its basic objectives. *McDonald v. Thompson*, 305 U. S. 263, 266; *Piedmont & Northern Ry. Co. v. Interstate Commerce Commission*, 286 U. S. 299, 311. Even if Section 4 II (1) were ambiguous, these principles would require that it be interpreted as inapplicable to the situation presented in the case at bar.

3. *The relationship between respondents and the contractors is not that of principal and agent.—*

Respondents have taken the position that they are the producers of the coal mined by the independent contractors because the latter are their agents. Neither respondents nor the court below denied that the producers in this case are independent contractors; but the court below, obscuring the point in a "veil of Latinity" (*Tiffany on Agency*, 2d ed., 1924, p. 8), assumed (R. 579) that the maxim *qui facit per alium facit per se* disposed of the case. This maxim is, of course, only a learned method of describing the agency relationship.¹⁵

Agent and agency are words of many meanings.¹⁶ It is unnecessary for purposes of this case, however, to delve into the "technicalities of the law of agency." *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, No. 1, present Term, decided February 10, 1941. The question here is to be decided in the light of the language and purposes of the Act and not by the mechanical application of com-

¹⁵ In *Standard Oil Co. v. Anderson*, 212 U. S. 215, 220, this Court recognized that: "* * * The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather restatements than explanations of the rule."

¹⁶ See *Restatement of the Law of Agency*, Secs. 1, 2, pp. 7-13; Mechem, *Agency* (2d ed., 1914), Secs. 1-8, 25, 26, 36-40; *Tiffany, Agency* (2d ed., 1924), Sec. 1; Hufcutt, *Agency* (2d ed., 1901), Secs. 1-8; Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 584; Steffen, *Independent Contractor and the Good Life*, 2 Univ. of Chicago L. Rev. 501; Leidy, *Salesmen as Independent Contractors*, 28 Mich. L. Rev. 365; 2 C. J. S., pp. 1023-1029; Note, 19 A. L. R. 226, 256 *et seq.*

mon law theories of agency, devised and developed in connection with questions of tort and contract liability.¹⁷ The remoteness of such theories from the sense and context of the Bituminous Coal Act is patent; and the magic of a Latin phrase does not bridge the gap. Congress certainly did not intend the exemption in Section 4 II (1) to apply when consumers and producers are entirely separate business enterprises, as they are here, irrespective of the common law definition of an agency relationship. Nor did Congress intend that, through the application of so-called common law principles, Section 4 II (1) should become an instrument for destroying the remainder of the Act. See *United States v. San Francisco, supra*.¹⁸

But even if common law principles of agency are to be applied, the contractors are not the agents of respondents under any of the accepted tests. An agent is "a person authorized by another to act on his account and under his control." "An agent * * * holds a power to alter the legal

¹⁷ Even statutes containing such terms as "employee" or "agent" are to "be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." L. Hand, J., in *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 553 (C. C. A. 2d), certiorari denied, 235 U. S. 705. See also *Restatement of the Law of Agency*, Sec. 220, comment d, p. 486.

¹⁸ Cf. *United States v. Rock Royal Co-op., Inc.*, 307 U. S. 533, 579-580; *United States v. Corinth Creamery*, 21 F. Supp. 265 (D. Vt.), in which the courts nullified attempts to use the agency device to escape from the price provisions of the Agricultural Adjustment Act.

relations between the principal and third persons." *Restatement of the Law of Agency*, Secs. 1, 12, pp. 10, 43. An agent is "a fiduciary" (*id.*, Sec. 13, p. 45). "Among the agent's fiduciary duties to the principal is the duty to account for profits arising out of the employment * * *" (*ibid.*).

The contractors in the present case present none of these characteristics. They operate on their own account and for their own benefit, and are in no respect subject to respondents' control in the conduct of the mining business. They are not empowered or authorized to bind respondents in contractual dealings with third persons. They buy materials, rent equipment, and engage labor in their own name as principals. They alone are liable for all the incidents of the mining operation. Respondents cannot and do not direct the contractors, even in the most general way, as to how the mining operations shall be conducted. They have merely the power to inspect and reject the coal after it is mined, a privilege normally reserved by commercial consumers. The price paid by respondents, as in the case of many other commercial contracts, is, in effect, on a cost-plus basis, but respondents have no control over the cost. They can merely terminate the contract and buy their coal elsewhere if they think that the costs of operation are too high. In short, the contractors are engaged in an independent calling and are responsible only for the end to

be achieved and not for the means by which it is to be accomplished.

It is thus clear that, under the most orthodox tests, the contractors here are not respondents' agents. Mechem, *Agency*, Secs 26, 40; *United States v. Driscoll*, 96 U. S. 421.¹⁹ In some situations independent contractors may act as agents for those with whom they contract, but, as we have shown, that is not this case. See *Restatement of the Law of Agency*, pp. 12-13, where the following illustration is given:

While an agent who contracts to act and who is not a servant is therefore an independent contractor, not all independent contractors are agents. Thus, one who contracts for a stipulated price to build a house for another who reserves no direction over the conduct of the work is an independent contractor; but he is not an agent since he is not a fiduciary, has no power to make the one employing him a party to a transaction, and is subject to no control as to his conduct.

The contracts by their terms seek to avoid any liability on the part of respondents for the acts of the contractors and thus to insulate respondents against any of the consequences of a genuine agency relationship. In other words, respondents do not

¹⁹ See also *Chicago, Rock Island & Pacific Railway Co. v. Bond*, 240 U. S. 449, 455-456; *Cascement v. Brown*, 148 U. S. 615, 622; *Metcalfe & Eddy v. Mitchell*, 269 U. S. 514, 520-521; *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 216. And see note 16, p. 38, *supra*.

desire to have the contractors deemed their agents where recognition of an agency relationship might, as it normally would, subject them to additional liabilities, but only where, as under the Coal Act, it might enable them to escape from a burden or obligation. The absence of any real incidents of agency is a significant indication of the true status of the parties.

The authorities relied upon by respondents are not opposed to our position. In *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, 103 F. (2d) 124 (C. C. A. 7th), the holding was that coal produced by a wholly-owned and controlled subsidiary was produced by the parent railroad company which consumed it because the subsidiary was under the "complete control, supervision and dominion" (p. 128) of the railroad, and was "a mere shell with no authority on its own account to act or perform" (p. 129). Since the Director's decision in the present case is based on the absence here of the very factors found determinative in the *Consolidated Indiana* case, that decision can scarcely be regarded as a precedent supporting the respondents.²¹

²¹ Although the *Consolidated Indiana* case does not conflict with, and indeed supports, the Government's position here, we believe that the decision in other respects is inconsistent both with the legislative history of the Act (set forth, *infra*, p. 47) and with subsequent decisions of this Court. Cf. *Higgins v. Smith*, 308 U. S. 473; *Taylor v. Standard Gas Co.*, 306 U. S. 307.

In *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, a state tax on persons engaged in the business of mining or producing iron ore, but excluding contractors who performed portions of the mining operation, was upheld against attack under the equal protection clause on the ground that the contractors were not engaged in mining on their own account, and were thus employees, not principals, in the business (p. 180). Since the parties to that case apparently agreed that the plaintiff mining companies and not the contractors were engaged in the business of mining within the meaning of the Minnesota statute involved, this Court did not pass on the question whether the contractors were subject to the tax. Determination of the issue of equal protection was not, of course, dependent upon whether the contractors were employees in a technical sense, but upon whether they could reasonably be differentiated from the principal mining companies. Moreover, in that case the plaintiff companies were unquestionably themselves engaged in the business of mining; the contractors were employed by them to perform particular parts of the mining operation, such as stripping off the over-burden or loading the ore into cars, rather than to take over and operate the entire mine free from supervision and control, as is the case here.

4. *The absence of a formal sale or transfer of title is immaterial.*— Respondents contend that because the transactions between them and the con-

tractors are not called sales (title technically being transferred to them by the lessors rather than by the contractors)²¹ and because the consideration paid may not be called a "price," the Act was not intended to apply. The contention does not advance their position, for even had Congress intended the Act to apply only to sales, that fact alone would scarcely make respondents the producer of the coal which they consume and consequently would not bring them within the exemption contained in Section 4 II (1).

In any event, the Act contains numerous proofs that it was not designed to be emasculated by the "witty diversities of the law of sales." Cf. *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *United States v. San Francisco*, 310 U. S. 16. Its price provisions are expressly made applicable to coal "sold or delivered" (Section 4 II (c)). Many provisions, including the penalty clauses (Section 5 (b)), apply to coal "sold or otherwise disposed of." Similar expressions showing that the Act is not restricted in its scope to technical sales are found

²¹ Respondents' leases did not give them title to the coal in place. *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 517-518; *Browning v. Boswell*, 215 Fed. 826, 834 (C. C. A. 4th); *Minor v. Pursglove Coal Mining Co.*, 111 W. Va. 28; *Graham v. Smith*, 170 Va. 246, 255. They obtain title only by the act of the independent contractor in severing the coal from the realty (*ibid.*). Thus, although title did not pass through the independent contractor, it rested in respondents only by reason of the act of the independent contractor.

throughout the statute.²² And in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 393, this Court noted that the regulatory provisions of the Act are applicable to "sales or transactions" in or affecting interstate commerce. Presumably the word "sale" was supplemented by more general language in order to prevent evasion of the Act by just such a device as the present record discloses. Here there was clearly a transaction, a delivery,²³ a disposal.²⁴

The court below assumed that there could be no price upon which the Act could operate if there were no sale. But the use of such terms as "other-

²² Section 1 ("regulation of the sale and distribution"); Section 3 (a) ("sale or other disposal"); Section 3 (b) ("sale or other disposal," "disposed of by sale," "disposed of otherwise than by sale," "sale or disposal"); Section 3 (d) ("disposed of otherwise than by sale"); Section 4 ("the code * * * shall be applicable only to matters and transactions in or directly affecting interstate commerce"); Section 4 H (e) ("sold or delivered or offered for sale"); Section 4 A ("transaction in coal," "sold, delivered or offered for sale"); Section 5 (b) ("sold or otherwise disposed of", "if disposed of otherwise than by sale", "sale or other disposal"); Section 5 (c) ("if disposed of otherwise than by sale", "sold or disposed of").

²³ The word "delivery" has been held not to be limited to situations where title has passed. *Poor v. American Locomotive Co.*, 67 F. (2d) 626, 630 (C. C. A. 7th).

²⁴ This Court has on several occasions stated that, "The expression 'to dispose of' is very broad and signifies more than 'to sell.'" *Hill v. Sumner*, 132 U. S. 118, 123-124; *Phelps v. Harris*, 101 U. S. 370, 380; *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 59; *Dayton Brass Castings Co. v. Gilligan*, 267 Fed. 872, 877-878 (S. D. Ohio), affirmed, 277 Fed. 227 (C. C. A. 6th), certiorari denied, 258 U. S. 619.

wise disposed of," as well as the basic objectives of the Act (see pp. 33-37, *supra*), shows that the word "price" is not to be construed in a narrow technical sense, but rather applies to the consideration paid for coal regardless of the form of the transaction. Despite the doubts of the court below, price regulation *can* operate upon the amounts paid by respondents to the contractors and lessors, which together are the economic counterpart of the price paid in an ordinary sale.²⁵

²⁵ Respondent's brief in opposition to the petition for certiorari expresses a fear that application of the minimum prices to coal obtained from the contractors would require respondents to pay the amount of royalty twice, both to the landowner or lessor and again as part of the compensation to the contractor. But in the Government's brief below it was expressly stated that, "When minimum prices are established, petitioners may, as to coal received from the contractors, and without any further order by the Division, deduct from the minimum prices the amount of any royalty paid to the lessors." Royalty payments are obviously a part of the price paid for the coal within the meaning of the Act, and the Government has no interest in the manner in which the price is divided by the lessor and the producing contractor. Moreover, appropriate administrative and judicial remedies are available under the Act for persons who believe that prices are improperly fixed. See Sections 4 II (d), 6 (b). Respondents are not in a position to complain about the erroneous inclusion of items in the price to be paid before it has occurred and before such remedies are exhausted. In view of the position taken by the Director, it is obvious that the fears expressed by respondents as to the necessity of paying double royalties are wholly chimerical.

5. *Legislative intention as to "captive" coal.*—

The court below based its ruling in part upon the assumption that Section 4 II (1) was intended to exclude all "captive" coal mines from the operation of the Act and that the mines in question are captive mines (R. 576).

The expression "captive coal," though often heard in the coal industry, is found nowhere in the present Act. The term is a loose one—a colloquialism in the industry, with no dictionary or legal meaning—used to describe numerous and widely varied situations. When Congress used the word "captive" in the 1935 Coal Act (not for purposes of exemption but in order to provide a basis for computing the amount of tax payable where there was no arms-length transaction), it also incorporated in the Act a definition of the term which included coal produced by a "subsidiary or affiliate" (49 Stat. 1008).

Section 4 II (1) does not contain the phrase "captive coal." The Senate passed an amendment to Section 4 II (1) (81 Cong. Rec. 3136) which provided for the exemption of coal produced by a subsidiary or affiliated company, thereby conforming Section 4 II (1) to the definition of captive coal contained in the 1935 Act, but the amendment was eliminated by the conference committee (H. Rep. 578, 75th Cong., 1st Sess., pp. 1, 8). It is thus clear that Section 4 II (1) was not intended to exempt even coal produced by corporations affil-

iated with the consuming company, although Congress had previously defined this to be captive coal.

Indeed, the carefully chosen language of the section is inconsistent with a contrary interpretation. It applies only to "coal consumed by the producer"; where the same person is both producer and consumer, there are no transactions between "them" which may be the subject of regulation. Section 4 II (1), in terms, covers only that type of situation, and there is no indication in its legislative history that it had any broader purpose.

The court below relied upon testimony given by Charles F. Hosford, Chairman of the former Coal Commission, before a Senate Committee, which it construed as expressing an opinion that the bill under consideration did not apply to captive coal. Hearings before the Senate Committee on Interstate Commerce on S. 4668, 74th Cong., 2d Sess., pp. 32-33. An examination of the testimony quoted (R. 578-579) will show that it throws no light upon the Congressional intention with respect to the present problem.²⁶ The testimony was given during a hearing on an earlier draft of the

²⁶ Since the bill then before Congress did not exempt captive coal, the statement of Mr. Hosford that the price provisions would not apply to such coal (R. 579) must be construed as meaning that the price provisions would be incapable of being applied to such coal. Since the only type of "captive" coal to which the price provisions could not be applied is coal produced and consumed by the same person, it is apparent that Hosford's statement as to the non-inclusion of "captive" coal expresses no different view of the scope of the Act than we attribute to it.

bill (S. 4668, 74th Cong., 2d Sess.)²⁷ which contained neither Section 4 II (1) nor any similar provision, and the testimony then given obviously did not relate to any such provision.

III

APPLICATION OF THE BITUMINOUS COAL ACT TO RESPONDENTS IS CONSTITUTIONAL

Before the Director and in the court below respondents argued that to apply the Coal Act to the transactions in question would be unconstitutional. They may renew that argument here.

Respondents do not deny that the coal they receive is shipped to them across state lines, nor that Congress has the power to fix the price of coal sold f. o. b. mine for interstate transportation. Cf. *Flanagan v. Federal Coal Co.*, 267 U. S. 222; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381. They rest their argument on the ground that application of the Act in the present circumstances would be to regulate the royalty paid for the right to extract coal and the amount paid for the service of mining coal, and that such payments relate to the production of coal and are wholly intrastate in nature.

It is clear from the foregoing discussion, however, that the Director is not regulating the amount

²⁷ This bill failed of passage in the 74th Congress. Bills on the same subject, though slightly changed, were introduced in the 75th Congress (S. 1, H. R. 4985). Section 4 II (1) first appeared in H. R. 4985, 75th Cong., 1st Sess. See H. Rep. 294, 75th Cong., 1st Sess., p. 6.

of the royalty or of the compensation for services but only the total amount to be paid for the coal. He does not claim the right to determine the manner in which the consideration paid for coal should be apportioned among its various cost components, so long as the apportionment is in good faith and not an effort to evade the statute. Any effect the regulation under the Act may have upon royalties and other compensation will result because they are an intrinsic part of the price paid for the coal.

Moreover, in view of the decision in *United States v. Darby Lumber Co.*, No. 82, present Term, it is clear that the Coal Act would be valid even if it were applicable to the intrastate ingredients of the consideration paid for coal shipped interstate. The coal here involved moves in interstate commerce, and regulation of the payment for services or royalties would bear as close a relation to the fixing of interstate prices as the regulation of wages bore to the prohibition of interstate shipments in the *Darby* case. Furthermore, if producers can dispose of their coal through the contractual arrangements adopted in this case, they will obtain an advantage over their competitors who comply with the prices established under the Act. Congress clearly has the power to protect interstate commerce against injury from such competition, even when it results from purely intra-

state transactions. *Houston & Texas Ry. v. United States*, 234 U. S. 342; *Wisconsin Railroad Comm. v. Chicago, B. & Q. R. Co.*, 257 U. S. 563; *Sunshine Anthracite Coal Co. v. Adkins*, *supra*; *United States v. Rock Royal Co-op, Inc.*, 307 U. S. 533; *United States v. Darby Lumber Co.*, *supra*.

The essence of respondents' argument is that, although Congress may regulate the price paid for coal shipped in interstate commerce, it cannot regulate the consideration paid for such coal if, in view of the absence of any passage of title, that consideration is not a "price" within the purview of the law of sales. But the power of Congress to regulate interstate commerce is not subject to any such refined restrictions. This Court has repeatedly proclaimed that technical considerations relating to the passage of title do not determine what constitutes interstate commerce under the Constitution. *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 463; *National Labor Relations Board v. Fainblatt*, 306 U. S. 601, 605; *Rearick v. Pennsylvania*, 203 U. S. 507, 512; *Pennsylvania R. R. Co. v. Clark Coal Mining Co.*, 238 U. S. 456, 465-468. Thus, it is plainly immaterial whether the compensation paid for coal shipped in interstate commerce is or is not a "price" within the meaning of the law of sales. Regulation of the consideration paid

for goods so shipped is a regulation of interstate commerce regardless of how the compensation is characterized.

Respondents also contend that the Fifth Amendment forbids regulation of the royalties to the lessor and the compensation paid for the services of the independent contractor. We have already stated that these are not regulated, and that only the total amount to be paid for the coal is fixed (see p. 49, *supra*). In any event, application of the Act to the contracts in question is necessary to effect its legitimate purpose as described by this Court in the *Sunshine Anthracite* case (310 U. S. at 394, 396). The "abuses of cut-throat competition" in the industry (*ibid.*) might readily be recreated if such devices as the one here employed were permitted to go unregulated. The due process clause does not impose destructive limitations upon the powers of Congress to carry out its legitimate policies. *Purity Extract and Tonic Company v. Lynch*, 226 U. S. 192, 201-202; *Ruppert v. Caffey*, 251 U. S. 264; *Everard's Breweries v. Day*, 265 U. S. 545, 560; *Otis v. Parker*, 187 U. S. 606, 609; *Westfall v. United States*, 274 U. S. 256, 259; *St. John v. New York*, 201 U. S. 633.

CONCLUSION

For the above reasons it is respectfully submitted that the judgment of the court below should be reversed.

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FEBRUARY, 1941.

No. 18

In the Supreme Court of the United States

OCTOBER TERM, 1941

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. TICKES, AS SECRETARY OF THE DEPARTMENT OF THE
INTERIOR, PETITIONERS

vs.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

SUPPLEMENTAL BRIEF FOR THE PETITIONERS ON
REHEARING

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The Government's main argument has already been presented in the brief filed at the last Term. This brief is submitted in order to reply more fully to several propositions advanced by respondents in their brief and at the argument.

1. THE FUNDAMENTAL ISSUE

Respondents urge that the transactions in coal here in issue are excluded from the operation of the Bituminous Coal Act, 50 Stat. 72, both because the regulatory provisions of Section 4 II do not

apply to such transactions and because the transactions are exempt under Section 4 II (1), which provides for the exemption of "coal consumed by the producer." Both contentions are based upon a single premise—namely, that the Act was not intended to regulate anything but sales and formal transfers of title, and that, therefore, any transaction which does not involve a sale or a formal transfer of title either does not fall within the scope of the regulatory provisions of the Act in the first instance or is expressly exempted from those regulatory provisions by Section 4 II (1).

In preparing our main brief, we assumed that respondents relied solely upon Section 4 II (1), and our brief was consequently devoted to establishing that respondents are not entitled to an exemption under the provisions of that section. The argument with reference to Section 4 II (1), however, specifically considers the question whether Congress intended to exclude from the scope of the Act all transactions involving no sale or other formal transfer of title (Br. 44-46); that discussion, showing that numerous provisions of the Act are incompatible with any such narrow construction, is directly applicable to respondent's argument based upon Section 4 II as a whole.

Respondents' contentions with respect to Section 4 II find no support in any express language of the Act. To the contrary, Section 4 specifically states that its provisions "are intended to regulate interstate commerce in bituminous coal,"

and that they shall apply to "*matters and transactions* in or directly affecting interstate commerce in bituminous coal." [Italics supplied.] Section 4 II (e) further provides that no coal subject to the provisions of the section "shall be sold *or delivered or offered for sale*" at a price below the minimum or above the maximum established by the Commission. [Italics supplied.] This section is entirely inconsistent with the view that the regulation is limited to transactions involving a sale or other formal transfer of title.

Respondents select isolated phrases used in various parts of the statute to demonstrate that the Act "concerns itself solely with commercial transactions in coal" (Br. 19); from this they reach the conclusion that only a transaction in which there is "a transfer by the producer of title to his coal" can properly be considered as commercial (*id.*). We may agree, at least for purposes of this case, that the Act is designed to regulate "commercial transactions" in coal. But we wholly disagree with respondents' further position that the transaction here in issue, because it was so arranged as to involve no transfer of title by the producer, is not a "commercial transaction." On the contrary, it was quite as much a commercial transaction, and quite as much a part of the competitive structure of the coal industry, as an outright sale of coal.

By stressing the technicality that there is in the present case no transfer of title by a producer,

and by failing to make clear the interdependence between the leases of the mineral rights and the contracts for the extraction of the coal, respondents suggest a misleading picture of the transactions into which they entered. The substance of those transactions, stripped of the legal formalism in which they were cast, is that respondents agreed to buy their coal requirements for a specified period (in one instance as short as sixteen days, in no instance longer than three years) from two persons—an owner of coal lands and a coal-mine operator—and to pay each separately. Instead of the coal-mine operator taking the mineral rights in his own name and simply selling the coal which he extracted to respondents, the mineral rights were put in the name of the respondents and were paid for directly by them to the landowner, thus technically avoiding a sale of the coal by the coal operator to the respondents. But the leases and contracts make clear that the substance of the transaction was no different from that of a sale and that the sole effect of placing the mineral rights in the name of respondents was to avoid a technical transfer of title from the operator to the respondents.

Respondents did not engage in the coal mining business. They did not make any investment in coal bearing lands.¹ They simply ordered what-

¹ Respondents' agreement to take all the coal produced from the lands during the term of the leases and contracts does not distinguish the transaction from a sale. A provision

ever coal they needed from the operator, the operator extracted it from the ground and delivered it to them, and they consumed and paid for it. In order to maintain the fiction that no sale was involved, they paid for the coal to two persons: they paid the landowner the standard royalty (which the coal operator would normally have paid) and they made the remainder of the payment to the coal operator. But, although two payments were involved, there was but a single "price" for the coal which the respondents bought. This is clearly shown by the contract provision for cancellation of the entire transaction if the price of the coal (royalty plus compensation to the contractor) exceeded the market price of similar coal and the contractor was unwilling to meet the price by reducing his compensation (R. 544-545, 327).

Respondents' brief urges that the transactions involved merely personal services and did not involve trade in coal as an article of commerce (Br. 21). This conclusion is reached through completely disregarding the leases and treating the contracts with the operators as arrangements for the "digging of coal" (*id.*). But the provisions of the leases and contracts themselves establish their interdependence beyond dispute and show that but a single deal, involving both a lease and an operating contract, was made with respect to

for the purchase by the vendee of the entire output of the vendor is, of course, frequently found in contracts of sale.

each mine. For example, the offer to assign the mineral rights in the Chilton mine to respondents was conditioned upon acceptance by respondents of an offer simultaneously made by Pritchard² to mine the coal and deliver it to respondents for a specified compensation (R. 242). Similarly, Pritchard's offer to mine the coal was conditioned upon acquisition by respondents of the mineral rights (R. 324). And the lease provided for its automatic termination upon termination of the operating contract for any reason whatever (R. 243-244).

It is manifest, then, that the parties intended the lease and operating contract to constitute integral parts of a single transaction. Consequently, respondents' arguments based upon the characteristics of the operating contract, considered separately from the lease, are both unrealistic and irrelevant. As this Court pointed out last term in discussing a comparable situation, "the two contracts must be considered together," because "to say they are distinct transactions is to ignore actuality." *Helvering v. Le Gierse*, 312 U. S. 531, 540. It is noteworthy that respondents have made no effort to show that the substantive effect of the lease and operating contract, considered as a single transaction, was not the same as that of

² Pritchard, in addition to being a coal operator, was president of the company which offered to assign the mineral rights (R. 544; 126, 131), and signed the offer in that capacity (R. 244).

an ordinary contract of sale. And we believe that, on the record in this case, no such showing can be made.

The respondents have not made any investment in coal lands; they are, therefore, in quite a different situation from a consumer which owns coal lands and engages a coal operator to mine the property.³ The respondents have simply taken a short term assignment of mineral rights (in one case as short as 16 days) upon an agreement to pay royalties for all coal which is extracted; they have coupled this with a contract giving a coal operator the exclusive right to extract the coal during the period of the lease; and they have completely protected themselves against any decline in the market by providing that they shall have the right to cancel both the contract and the lease at any time that the composite "price" which they have to pay for the coal under the lease and the contract exceeds the market price. It is evident, therefore, that respondents bear none of the risks of ownership. And it is equally evident that they do not enjoy any of the privileges of ownership. The only right which the respondents secured by

³ The Director of the Bituminous Coal Division has never made a determination whether, in that type of situation, the owner of the coal lands would be entitled to exemption from the Act, and no such determination need be made here. If such a case were to arise, the Director would doubtless inquire into all the facts with respect both to the ownership of the coal lands and the control and conduct of the mining operations in reaching his determination.

virtue of the lease was the right to extract coal from the mine—yet under the terms of the lease and operating contract they could never exercise that right themselves. They were required, as a condition of securing the lease, to sign the contract, the effect of which was to give the mine operator the exclusive privilege of exercising their right to extract the coal. And they could never regain the right to extract the coal themselves, because the term of the lease was the same as that of the contract and any cancellation of the contract prior to its termination would automatically terminate the lease. Thus, considering the lease and contract together, all respondents actually received was a right to the coal itself after extraction from the ground—precisely what the vendee in an ordinary sale receives.

It is manifest, therefore, that the substantive effect of the transaction under review is that of a lease of the mineral rights to the coal operator and a sale of the coal extracted by the operator to the respondents, disguised in a somewhat different legal form in an attempt to evade the Act. Respondents' contention that this transaction was not "commercial" and not "part of the competitive picture" is, therefore, completely untenable. The fact, stressed in respondents' brief, that during the period of the lease and contract there was no competition among producers to sell coal to them is without significance. This is true in the case of any contract to purchase a commodity for a

specified period, for during the term of the contract the parties to it are *pro tanto* withdrawn from the competitive market. Clearly at the time that the contracts were made and renewed, respondents and the persons with whom they were dealing were in direct competition with other buyers and sellers on the commercial market, the standard for all being whether the price to be paid the contractor and lessor together was greater or less than the prices charged by other producers selling similar coal.

Moreover, it appears from the face of the contracts that even while they were in effect the contractors were forced to compete with other producers. For both the contracts and leases could be terminated by respondents whenever they could buy coal on the market at a price lower than the total price to be paid under the contract and lease arrangement. Certainly a person, whether he be called contractor or producer, who must reduce the compensation he is to receive in order to avoid losing a customer is in competition with another producer who may deprive him of his patronage by charging a lower price.⁴

⁴ The contractor is from a practical standpoint in no different competitive position than a producer who has entered into a long-term contract of sale with a similar cancellation clause, or even than a producer who, without any contract, has regular customers whom he has supplied for a long period and will continue to supply so long as he meets his competitors' prices.

It is thus clear that if we accept respondents' premise that the Act applies only to commercial or competitive transactions, the arrangement devised comes within that category. Realistically considered, the very type of commercial transaction in coal which the Act was designed to regulate has taken place. Consequently, the Director's determination that the Act is applicable, despite the particular form which the deal took, cannot be said to be without rational foundation or to misconceive the Congressional purpose in enacting the statute.

In this connection, we wish to emphasize the possibilities for evasion which are inherent in the scheme. The device is just as applicable to small amounts of coal as it is to the requirements of the Seaboard Railway. A consumer desiring 100 tons of coal, for example, need only arrange for the purchase in the form of a lease of mineral rights and an operating contract, instead of in the form of an ordinary contract of sale, and, under respondents' contentions, the price provisions of the Coal Act become inapplicable. It is significant that 24 applications for exemption, on grounds similar to those upon which respondents rely, have been filed with the Director. One of these applications seeks exemption for a transaction involving as little as 6,200 tons of coal. *Application of Morgantown Glassware Guild*, No. 1463 F. D., filed October 16, 1940.

2. RESPONDENTS' ARGUMENT BASED UPON THE PROVISIONS OF SECTION 3

To support their argument that the Act applies only to sales or other technical transfers of title by the producer, respondents rely upon the provisions of Section 3. They urge that the transactions into which they entered are not subject to the taxing provisions and penalties of Section 3, that Congress could not have intended to subject to the regulatory provisions of Section 4 transactions not subject to the tax sanctions of Section 3, and consequently that the transactions should be held excluded from the scope of Section 4.

The argument fails because its basic premise—that the transactions are not subject to the taxing provisions of Section 3—is without foundation. Section 3 taxes the “sale or other disposal” of bituminous coal. This provision clearly covers the present case. The transactions here in issue, since they are sales in substance, may well be considered sales within the meaning of Section 3. But even if they may not be considered as sales, they must certainly be considered as a “disposal” of the coal. By virtue of the transactions, respondents became entitled to receive, and did receive, for use on their railroad system coal which, at the time they made the deal, was still in the ground and in which they then had no right, title, or interest. If “disposal” denotes anything broader than a formal sale, as it clearly does, it must cover this type of situation.

Respondents argue to the contrary on the basis of the provision in Section 3 which provides:

The term "disposal" as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.⁵

But this provision, as its wording shows, was not designed as an exclusive definition; its obvious purpose was to give the term "disposal" a broader construction than it might otherwise have received. Congress has not said, as respondents suggest, that disposal "means" only consumption or transfers of title by a producer; it has said rather that the term disposal "includes" consumption and any transfer of title by a producer. As respondents themselves state in their brief in another connection (Br. 41), "the use of the term 'includes' obviously excludes the construction that the definition * * * in this section is all-embracing." Cf. *Hefvering v. Morgan's, Inc.*, 293 U. S. 121, 125; *Phelps-Dodge Corp. v. National Labor Relations Board*, No. 387, October term, 1940, decided April 28, 1941. And, to quote respondents again (Br. 44), since "means" instead of "includes" is contained in other statutory definitions (Section 17),

⁵Section 17 contains a general list of definitions of terms "as used in this Act." The definition of "disposal" in Section 3 defines that term only "as used in this section." It is thus clear that the definition in Section 3 applies only to that section and not to the remainder of the statute.

“the absence of that word” in the definition in Section 3 “forcefully demonstrates that the definition * * * is not all-embracing.”

3. RESPONDENTS' ARGUMENT THAT THEY BEAR THE BURDEN OF THE MINING OPERATIONS

In connection with their argument that they are the “producer” of the coal which they consume within the meaning of Section 4 II (1), respondents urge that they are engaged in the business of mining because they bear most of the costs of the mining operation. Respondents concede that the contractors bear all the costs in the first instance, but the decisive fact is alleged to be that the respondents are obligated by the contracts to bear the ultimate burden of most of the expenses. They rely particularly on the provisions of the contracts that the amount to be paid shall be adjusted to take into account increases or decreases in those cost items which are beyond the control of the contractor—in particular, wages, taxes, power rights, and the average costs of the materials purchased (e. g., R. 262, 269-271).

These facts in no way support the contention that respondents are the “producer” of the coal they consume. In the case of any business which is not operated at a loss, the purchaser of the product ultimately bears all of the costs of operation. But this plainly does not convert the purchaser into the manufacturer of the goods. And similarly, the fact that the price agreed upon for the

goods is flexible or that it is adjustable so as to take into account cost items not within the control of the parties does not serve to put the consumer into the business in which the producer is engaged. Such cost-plus provisions are frequently found in ordinary contracts of sale. See *United States v. Driscoll*, 96 U. S. 421; *Kruse v. Revelson*, 115 Ohio St. 594; Note, 55 A. L. R. 291.

Respondents contend (Br. 46) that the contracts reserve to them control over the contractors' accounting and also recognize their right to control salaries and rates of pay which are within the control of the contractor. Insofar as accounting is concerned, the contracts merely provide that the respondents shall be given full access to the accounts of the contractor, and that the contractor will keep the records in such a way as to enable the receiver to ascertain the costs.⁶ These provisions of the contracts merely permit the respondents to verify the contractor's statements of ac-

⁶ Paragraphs 9 and 10 of the contracts, referred to in respondents' brief, read as follows (R. 303, 265) :

"9. The Receivers, or their authorized representatives, shall be given full access to the property, records, and accounts of the Contractor at all times for the purpose of enabling them to ascertain the Contractor's costs, and the Contractor agrees that he will cause his records and accounts to be kept up to date and in an efficient way that will readily enable the Receivers to ascertain such costs.

"10. The Receivers shall have the right to keep an accountant and/or inspector at the mine at their expense, and the Contractor agrees to provide suitable working quarters."

count and do not vest in respondents "control over the account." Cf. *United States v. Driscoll*, *supra*.

The contracts originally entered into did contain provisions that the contractors would submit to the respondents a schedule of the rates of pay and salaries over which the contractor has control and that such rates would not be put into effect or changed without respondents' written approval (R. 262, 300, 326). This provision, however, was eliminated in the renewal of the contract for the Glamorgan Mine in 1937 (cf. R. 188-189 and 195 with R. 262, 270), and apparently was eliminated from the contract for the Chilton Mine as re-drafted in 1937 (cf. R. 314-315 with R. 299-300).⁷ This indicates that the provision was not regarded as of much, if any, consequence. Moreover, since the detailed description in the record as to how the parties operated under the contracts contains no reference to any exercise by respondents of control over the contractors' salaries or wages, it is apparent that the provisions were in fact ignored.

⁷ Although the renewal of the Chilton contract in April 1937 does not state specifically that Paragraph 7 (a) of the original contract (R. 299-300) was to be replaced by Paragraph 3 of the renewal (R. 314-315), a comparison of those two paragraphs shows that Paragraph 3 is in fact a complete substitute for Paragraph 7 (a). The subparagraph relating to respondents' control of salaries and wages is the only one completely eliminated.

4. THE EXTENSION OF THE STATUTE

In the Government's petition for rehearing, the Court's attention was called to the fact that the Bituminous Coal Act, which would otherwise have expired by its own terms on April 26, 1941, was extended shortly after the order of affirmance was entered in the case at bar. The House of Representatives had passed the bill on March 27, 1941, prior to this Court's decision. Thus only the Senate was able to give any consideration to the effect of this case upon the pending legislation.

It is evident that the failure to amend the Act at that time was not a manifestation of Congressional approval of the decision of the Circuit Court of Appeals or of this Court. The Senate Committee (S. Rept. No. 169, 77th Cong., 1st Sess.) dealt with this precise question:

Subsequent to the passage of H. R. 4146 by the House of Representatives, but 2 days prior to the beginning of the hearings before the subcommittee, the Supreme Court announced its decision in the case of *Gray v. Powell and Anderson*. This case involved the question whether a railroad which had leased coal and had engaged persons to mine the coal as "independent contractors" for shipment to and consumption by the railroad, was exempt from the regulatory provisions of the act as the "producer" of this coal. The question rested upon construction of various provi-

sions of the act, particularly sections 4 II (1) and 17 (c). The Circuit Court of Appeals for the Fourth Circuit, reversing an order of the Director of the Coal Division, held that the railroad was exempt. The Supreme Court was equally divided, there being a vacancy on the Court, with the result that the decision below was affirmed. The Department of Justice has indicated that it will petition for rehearing before a full bench of nine justices and ask that disposition of its petition await filling of the vacancy which now exists on the Court. The action of your committee in reporting favorably H. R. 4146 to extend the Coal Act for a period of 2 years is not intended, either expressly or by implication, as ratification or approval in any respect of the interpretation of the act by the Fourth Circuit Court of Appeals or the Supreme Court of the United States in the case in question.

The failure of the Senate to amend the bill as it passed the House so as expressly to disapprove of the result reached by the court below in this case is explained by the urgent need for dispatch in the enactment of the measure. In the Senate report the Committee stated (p. 4):

It is particularly important that expeditious action be taken to extend the life of this act because it expires on April 26, 1941, and because extension of the act may assist in the prompt adjustment of the differences

between the mine workers and operators which have led to a suspension of the mining of bituminous coal.

And on the floor of the Senate, Senator Barkley urged that the bill not be amended in any fashion because this would mean that it would have to go back to the House for reconsideration, with a resultant delay in final enactment of the measure. 87 Cong. Rec. 3096, 3097 (advance ed.).

CONCLUSION

The decision below should be reversed.
Respectfully submitted.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 603.

18

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE
INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.

W. R. C. COCKE,

JOS. F. JOHNSTON,

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OPINIONS BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. pp. 97-104) is reported in 114 Fed. (2d) 752. The findings, conclusion and opinion of the Director of the Bituminous Coal Division may be found at Record 1-32.

THE QUESTION PRESENTED.

This case presents only the narrow question whether, on the undisputed facts disclosed by the Record, certain coal mined for the Seaboard Air Line Railway by its contractors is what is generally known as "captive coal" within the meaning of the provisions of the Bituminous Coal Act of 1933 (50 Stat. 72, 15 U. S. C., Secs. 828-851) which exempt such coal from the price-fixing and regulatory provisions of the Act. The specific section involved is:

4-II(1) "the provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him."

The court below adjudged merely that this section of the Act is controlling under the proven and undisputed facts of this particular case, and no question of general importance or administrative significance is involved.

STATEMENT.

It should be emphasized at the outset that there is no actual dispute as to the basic facts of this case upon which the determination of the question of law must be predicated. There is no conflict of testimony in the record, as all the evidence was candidly given by witnesses for the railroad, the truth of which has not been challenged. The case has throughout its course involved merely the proper application of the statute in a situation presented by what is in substance an agreed statement of facts. That situation is as follows:

Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, to insure an adequate and constant supply of coal for the railroads committed to their charge by the District Court of the United States for the Eastern District of Virginia, in 1934 and 1935 by instruments of conveyance, which have been successively extended and renewed, acquired by grant from the owners of coal-bearing lands the sole and exclusive right to take coal from such lands. (R. pp. 3, 11, 15). Concurrently respondents engaged the services of skilled mine operators to perform for them the work and service of extracting and loading on cars at the mine the coal so acquired. (R. pp. 5, 12, 17). All of the coal involved is owned by, shipped by respondents to themselves and consumed by respondents. (R. p. 21). The contractors have or claim no title or interest in the coal either before or after severance, have no right or power of sale or other disposition of the coal and their sole duty is to act in conformity with instructions given them by respondents. (R. pp. 20, 21, and 40-44, incl.). Respondents derive their title to the coal by grant from and direct privity with the owners of the coal-bearing lands and royalty payments for all coal extracted are made by respondents directly to the landowners. (R. pp. 3, 11, 15, 40-44, incl.). Neither respondents nor the contractors have any stock or other interest in or control of the landowners; each and every of the parties to the transactions are separate legal entities and independent of the other or others. (R. p. 24).

The compensation paid by respondents for the work and service performed by the contractors during

each contract period includes all costs of production of the coal as established by the records and experience of the contractors. Such compensation is paid either monthly or semi-monthly, and in some instances weekly, as the necessities of the contractor require. Each of the contracts provides for adjustment of the compensation paid to the contractor to cover fluctuations in production costs. (R. pp. 13, 17, 68).

The Director of the Bituminous Coal Division concluded that the respondents were not engaged in the business of mining the coal involved and on that ground were not producers whose coal was entitled to exemption from the regulatory provisions of the Bituminous Coal Act. (R. p. 26). The United States Circuit Court of Appeals for the Fourth Circuit (R. pp. 97-104) (114 Fed. (2d) 752) in a unanimous opinion reversed the order of the Director and remanded the matter for entry of an order granting the respondents' petition for exemption.

ARGUMENT.

I.

The issues of this case affect a very small percentage of the amount of bituminous coal produced.* There is no conflict of decisions and no issue of national importance is raised. Similar cases involving the right of a producer to exemption from the regulatory provisions

* Weekly Coal Report 1173, issued January 6, 1940, by the United States Department of the Interior, Bituminous Coal Division, states:

"The total production of soft (bituminous) coal in the year 1939 is estimated at 389,925,000 net tons."

The production of respondents at their three captive mines during the year 1939 was 565,465 tons, or less than 2-10ths of one per cent of the total production for the whole country.

of the Coal Act have been decided. In *Northwestern Improvement Company v. Ickes*, (CCA 8th) 111 Fed. (2d) 221, a petition was filed to review an order of the Director of the Bituminous Coal Division which denied an exemption to the applicant. The court sustained the order of the Director because it was clearly shown that a sale of the coal by the applicant—the producer of the coal—to the railroad company occurred. The basis of the claim to exemption was that the railroad wholly owned the stock of the applicant mining company. *Consolidated Indiana Coal Company v. National Bituminous Coal Commission*, (CCA 7th) 103 Fed. (2d) 124, cited by the court below in support of its decision, arose under the same sections of the Bituminous Coal Act as are here involved. In that case, as here, the coal produced was consumed by the railroad company. It was owned by one wholly owned subsidiary of the railroad company and mined by another. The question was whether the coal, which was consumed by the railroad company, or its trustee appointed in reorganization proceedings under Section 77 of the Bankruptcy Act, produced by and through the agency or instrumentality of another, is entitled to exemption under Section 4-II(1) of the Bituminous Coal Act of 1937. The Circuit Court of Appeals for the Seventh Circuit, in reversing the order of the Bituminous Coal Commission and granting the exemption claimed by petitioners, said:

“Respondent evidently predicated its conclusion upon the theory that petitioner on the one hand, and the trustees on the other, constituted separate corporate entities and ignored the contention advanced by the petitioner that it was merely serving the trustees in the capacity

of an agent and that, as such, it was only an instrumentality of the trustees. In this, we think, respondent is in error. The conclusion is inescapable that petitioner was the agent of the trustees in the production of coal, and this is true irrespective of whether petitioner and the Railway Company be considered as separate and distinct corporations, or whether, under the circumstances, they be considered as merged."

* * * * *

"In the instant situation, the trustees of the Railway Company could produce coal only by agents, and we discern nothing to preclude a corporation from being the agency thus utilized. We, therefore, are of the opinion that the coal involved in this proceeding was produced by the trustees by and through the agency of petitioner, and that it is consumed by the trustees in the operation of its railroad. Being both the producer and the consumer of the coal, it is entitled to the exemption provided in Sec. 4-II(1) of the Act."

* * * * *

"That Congress intended to exclude from the requirements of Section 4 coal consumed by the producer is obvious, and we think it must be held that such exclusion is permissible whether the consumed produced the coal in individual capacity or through the capacity of an agent. To hold otherwise is to countenance a situation in the instant matter which borders close to absurdity."

And again on p. 130 of 103 F. (2d), in rejecting the contention of the Commission that because the Senate had eliminated an amendment to define "producer"

to include a wholly-owned subsidiary, it was the intention of Congress not to permit the exemption of coal produced by such corporation, the court said:

"To so conclude is to impute to Congress an intention to abrogate the well recognized law of principal and agent."

Notwithstanding the decision in the *Consolidated Indiana* case, *supra*, adverse to the Bituminous Coal Division, the Commission (predecessor of the petitioners) apparently did not consider the issues raised (which are identical in principle with those involved in this case) to be of sufficient national importance to justify review by this court, for no application for certiorari was made. This court considered the constitutionality and purposes of the Bituminous Coal Act of 1937 in *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, and set up standards upon which the lower courts could rely in reaching their decisions, and which were adopted and applied by the Fourth Circuit Court of Appeals in its decision in the case at bar.

Certiorari was denied by this court in *Sunshine Anthracite Coal Company v. National Bituminous Coal Commission*, (CCA 8th) 105 Fed. (2d) 559, cert. denied 308 U. S. 604, rehearing denied 308 U. S. 638. That case was of far greater national importance than the one now at bar. It involved the effect of a far-reaching decision by the Commission upon the question, denied by *Sunshine Anthracite Coal Company*, of whether all coal produced in the State of Arkansas was bituminous coal subject to regulation under the National Bituminous Coal Act, but this court refused to review the Circuit Court's decision.

The record clearly shows that the contractors do not sell or otherwise transfer any title to the coal to respondents and have no such right of sale or title to transfer; that respondents do not pay the contractors for the coal but for their work and service of mining and loading the coal on cars at the mine for shipment to and consumption by respondents; that respondents, and not the contractors, are the producers of the coal and the contractor is merely the agent or instrumentality through which the coal is produced by respondents. The evidence affords no support for the Director's findings and decision that respondents are not the producers of the coal and are not entitled to the exemption claimed by respondents. The Director's conclusion ignores completely the fact, as held by the court below in this case and as recognized by this court in *Sunshine Anthracite Coal Company v. Adkins*, supra, that the price regulation provisions of the Act relate or apply only to coal or transactions in coal in which a sale of or other transfer of title to the coal by the producer occurs. Upon this point the decision by the court below states:

"The mistake of the Director was due to considering the various incidents of the process of the production and ignoring the vital element of price regulation. There is manifestly nothing upon which price regulation can operate where no price is possible; and no price is possible where *no sale can possibly take place* and all that is involved is the mining of coal under contract for the owner." (Emphasis ours.)

The court below held further that the Director also erred in interpreting the definition of the term

"producer" as contained in Section 17(c) of the Act, which section provides:

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

as being all-embracing. The word "includes" is unambiguous and clearly indicates the definition of "producer" in that section is not all-inclusive.

The error of the Director in holding that respondents are not entitled to the exemption claimed by them because "not engaged in the business of mining coal" is thus pointed out in decision of the court below:

"Respondent's point to Sec. 17(c) of the Act, which provides that 'The term producer includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal.' They argue that only the person, corporation, etc., that does the actual mining comes within the definition. We think that one who has the coal mined through the instrumentality of an independent contractor falls just as clearly within the definition. *Qui facit per alium, facit per se*. Certainly if these petitioners were selling the coal mined for them by the independent contractors, we could not hesitate to hold that they were subject to the code and price-fixing provisions of the Act; and on the same principle we must hold that, where they consume the coal thus produced, they are exempt from those provisions under Sec. 4(l). For the purpose of the Act, we can not see what difference it makes whether the owner of a mine digs the coal himself with his own organization or

whether he has it dug for him by an independent contractor, who assumes the risks and responsibilities of that relationship. In either event, the owner causes the coal to be mined and prepared for use. He is the one by whom the first sale after production is made, if it is made. If he sells it, he should certainly be held subject to the regulatory provisions of the Act; and if he consumes instead of selling it, there is as much reason for exempting him from the regulatory provisions in the one case as in the other. To say, as does the Director, that petitioners do not pay the cost of mining the coal, is not correct. They pay the cost on a tonnage basis to the contractors. As well say that the builder of a house does not pay the cost of installing the plumbing because he contracts with an independent contractor to install it."

Oliver Iron Mining Company v. Lord, 262 U. S. 172, had been decided long prior to the enactment of legislation regulating the coal industry, and it seems probable that this court's decision in that case guided the legislative draftsman in their method of defining "producer" in the Bituminous Coal Act. In the *Lord* case the principal endeavored to escape the imposition of an occupation tax imposed by the State of Minnesota on the ground that it was not engaged in the business of mining coal. This court rejected its contention and said:

"Here the selection is of all who are engaged in mining or producing ores on their own account; that is to say, as owners or lessees. The selection seems to be an admissible one, so we turn to the objections urged against it.

"One is that contractors who strip off the over-burden of soil, gravel, etc., in open-

pit mines, other contractors who load the ore in such mines into cars, and still others, usually four in a group, who take ore out of underground mines, are not included. But none of these are engaged in mining on their own account. Instead, they are working for those who are so engaged. However important their service, they are not principals in the business, but employees; and their pay, whatever it be, is part of the expenses of the business. Their omission has a reasonable basis."

The case clearly holds that the Iron Mining Company was the "producer" of the iron ore, even though the contractors did the work.

The *Lord* case illustrates the error of the Director in his holding that respondents are not engaged in the business of mining coal. The status of the Iron Mining Company and that of the respondents does not appear to differ, and it would seem to follow that if this court held the Iron Mining Company to be "engaged in the business of mining iron ore" under the Minnesota statute, there is every sound reason for a similar holding in this case as applied to respondents under Section 17(c) of the Bituminous Coal Act of 1937.

The testimony of Mr. Chas. F. Hosford, Jr., former chairman of the National Bituminous Coal Commission, one of the most ardent proponents for the regulation of the bituminous coal industry, appended as a footnote to the decision of the Circuit Court of Appeals (R. pp. 102, 103) is convincing that the operations of the respondents are not within the purview of the price-fixing regulations of the Act.

Manifestly the provisions of an act designed to regulate not production or the costs of production but commercial sales in the general market can have no possible application where there is in fact no commercial transaction or sale. Here the coal is owned in the first instance, either in place or immediately upon severance, by the railroad. An attempted application in this situation of the price-fixing provisions of the statute, under schedules which have fixed minimum prices to cover not only the cost of production as such but the royalties or value of the coal itself, would produce the patently absurd result of requiring the railroad to pay twice for the ownership element. Having already paid the landowner for the value of the coal, respondents would be required to pay for it again, and the second payment would be made to a contractor who admittedly had not the remotest interest in or title to the coal.

Under the circumstances presented by this record, the decision of the court below is so plainly correct as to foreclose further argument.

II.

Petitioners assert that the court below exercised its own independent judgment as to whether or not respondents were a "producer" within the meaning of the Act, without giving any weight to the Director's findings and decision. They seek to predicate upon this assertion the argument that the court below has in some way interfered with the independence of the administrative authority with respect to matters of fact committed to its determination. In view of the fact that there is no

dispute or controversy whatever in the record except as to the proper interpretation and application of the statute under the admitted circumstances shown to exist, the argument is irrelevant, and rests upon the mere assertion. These issues, decided by the court below adversely to petitioners' contentions, are whether or not it is the intent and purpose of the Act that the price regulatory provisions thereof apply only where a sale of or other transfer of title to the coal by the producer occurs; whether or not, in the particular case presented by this record, such sale or transfer of title by the producer occurs, and whether or not where, as in this case, the owner of coal, both before and after severance, and sole consumer of the coal produced, who employs a skilled mine operator to mine the coal and load same on cars at the mine for shipment to and consumption by such owner, is the producer of the coal and entitled to exemption from the price-fixing and related regulations of the Act. These are all questions of legislative intent as to the purpose and scope of the Act, are questions of law to be determined by the courts in the proper exercise of their judicial powers and in the determination of which the courts are not bound by administrative decisions. Therefore, the decisions cited by petitioners as supporting their assertion that the court below in its decision exercised its independent judgment and failed to give any weight to the Director's findings and decision have no application to the case at bar.

If it were possible, which we think it is not, to regard the Director's decision as merely a conclusion of ultimate fact, then it is clear that the record contains no evidence to support it. There is no rational

basis for the conclusion that the owner of coal must pay a price for it to one who has no interest in it.

CONCLUSION.

The decision of the Circuit Court of Appeals, which petitioners seek to have reviewed, is correct. The petition for certiorari should be denied.

Respectfully submitted,

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FILE COPY

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1940.

No. 603.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE
INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIR-
CUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

OPINIONS BELOW.

The Report and Findings of the Director of the Bituminous Coal Division are contained in the Record at page 532 and the opinion of the Circuit Court of Appeals for the Fourth Circuit, reported in 114 F. (2d) 752, at pages 573-580 of the Record.

THE QUESTIONS PRESENTED.

The skeleton statement of petitioners under this heading (Brief, p. ~~242~~²⁴³) is inadequate and erroneous in several respects.

The statement that the railroad (represented by the Receivers) made a contract with a "coal producer" for the mining of their coal assumes the answer to one of the principal issues in the case. Respondents deny that the contractors whom they engaged to extract their coal are "producers" within the meaning of the Act. The contractors merely mine the coal for the respondents, and respondents are the producers in that production of the coal is within their exclusive dominion and control.

It is next asserted that under the contracts the producer "was to assume, and indemnify the railroad against, all liabilities, burdens and risks attendant upon the coal mining business." The facts, as disclosed by the record without dispute, are that while the contractors did assume certain liabilities and risks in the first instance and toward third parties, the railroad is bound under the contracts to reimburse the contractors for every cost of operation which is not within the control of the contractor. The burdens and risks of the operations are therefore in the final analysis actually upon the railroad and not in any real sense upon the contractor. Both the motivating power behind the extraction of the coal and the entire financial responsibility of paying the costs belong to the respondents.

The bare facts are that the railroad leased certain lands or the mineral rights therein, and simultaneously engaged the services of contractors to mine and load the

coal in amounts as directed by the railroad. Compensation, including all cost of operation, is paid to the contractors and royalties are paid by the railroad to the landowner. All the coal mined by the contractors is consumed by the railroad in its operations. The contractors have no right, title or ownership in the coal and there are no relationships between any of them and the respondents other than under the written contracts shown in the record.

The question is whether the operations carried on by the contractors under the general direction and control of the respondents are within the scope of the Act, and whether, therefore, the compensation which the contractors receive for their services can be regulated—*i. e.*, increased—by reference to the prices for similar coals fixed for the commercial market under the price-fixing machinery of the statute.

The determination of this issue involves the following questions:

I. Whether the price-fixing and related provisions of Section 4-II of the Bituminous Coal Act apply only to coal or transactions in coal in which a sale or other transfer of title to the coal by the producer thereof occurs.

II. A subsidiary issue is raised as a preliminary to the review of the Director's decision that respondents are not producers of the coal within the meaning of Section 4-II(1), by the petitioners' contention that the Director's determination on the point is final.

III. If Section 4-II applies generally to coal and transactions in coal in which no sale or other transfer of title to the coal by the producer is

involved, whether the coal produced at the respondents' mines is consumed by the producer within the meaning of the exemption in Section 4-II(1).

IV. Whether the provisions of Section 4-II, if applied to the coal produced at these mines and the transactions disclosed by the record, are constitutional and valid.

Petitioners refer in their statement of the questions presented to the second of these issues only. The question whether the coal is consumed by the producer within the meaning of the express statutory exemption cannot arise until it has been determined whether the Act as a whole has any field of operation in the situation disclosed by this record. Respondents say that the Act has no application here no matter who is called by the name "producer," because there is no sale or other transfer of title to the coal by either the railroad or the contractors.

The Director concluded as a matter of law that the Act applied here because the service of the contractors in mining the coal and loading it on cars was a "matter or transaction in interstate commerce" within the purview of the statute (R. p. 551). He also concluded that the respondents were not the producers of the coal and hence not entitled to exemption under Section 4-II(1), because "not engaged in the business of mining coal" and on the ground that the definition of the term "producer" contained in Section 17(c) of the Act is all-inclusive. (R. pp. 547, 549).

The Circuit Court of Appeals reversed the order of the Director upon the grounds:

(a) That Section 4-II of the Act relates and applies only in case a sale or other transfer of title to the coal *by the producer* is involved;

(b) That in the case at bar no sale or transfer of title to the coal in question *by the producer* was involved; and

(c) That respondents are both the producers and consumers of the coal within the meaning of Section 4-II(1), and that the Director's decision was not supported by substantial evidence and was based upon error of law.

It was accordingly unnecessary for that court to consider or determine the constitutional question referred to in IV above.

THE STATUTE INVOLVED.

The statute involved is the Bituminous Coal Act of 1937, c. 127, 50 Stat. 72-91, U. S. C. Supp. V, Title 15, secs. 828-851.

The Act is an extensive document, and since petitioners state that they will hand copies to the Court on the argument, it is not reprinted in this brief.

The parts of the Act directly involved are Sections 4-II and 4-A, which contain the substantive regulatory and price-fixing provisions, the basic issue being whether or not these regulatory provisions apply only to commercial transactions in coal in which a sale or transfer of title to the coal by the producer occurs. The tax provisions of Section 3 are also pertinent to the determination of this issue.

A separate but related issue is whether or not if Section 4-II is not so limited in its application, the coal produced at respondents' mines is nevertheless expressly exempted from the price-fixing and other regulatory provisions, by Section 4-II(1):

Sec. 4-II(1). The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

It is asserted by petitioners, and denied by respondents, that the language of Section 17(c) throws light on the second question:

Sec. 17.—As used in this Act:

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

The language of Sections 4-A and 6(b) is involved in the petitioners' argument that the determination of the Director upon the second issue above stated is not reviewable.

STATEMENT OF THE FACTS.

The record discloses no conflict of testimony. All evidence was candidly given by witnesses for the Railway and its truth has not been challenged. The case involves merely the proper interpretation of the statute as applied to the basic and undisputed facts.

Respondents, as Receivers of the properties of Seaboard Air Line Railway Company, in order to

insure an adequate and constant supply of coal for the railroads committed to their charge, as well as to save money in the event of future increases in the price of coal on the commercial market, in 1934 and 1935 by instruments of conveyance, which have been successively extended and renewed, acquired by grant from the owners of coal-bearing lands the sole and exclusive right to take coal from the lands at the three mines, namely, the William-Ann mine in Mingo County, West Virginia, the Chilton Block No. 1 mine in Logan County, West Virginia, and the Glamorgan mine in Wise County, Virginia. Concurrently respondents engaged under the respective contracts (R. pp. 27, 30, 34, 182, 256, 293, 324) D. H. Pritchard and Peerless Coal Corporation—skilled mine operators—to perform for respondents the work and service of extracting and loading on cars at the mine the coal so acquired (R. pp. 27, 30, 34, 182, 251, 293, 324). In each case the right and title to the coal was acquired by respondents from the fee owners of the land on the usual royalty basis whereby respondents pay royalties to the landowners at a fixed rate per ton for all coal mined and are obligated in any event to pay minimum royalties in amounts totaling some \$29,000 per annum whether any coal is extracted or not (R. p. 545).

All of the coal involved is owned by respondents, is shipped by respondents to themselves and consumed by respondents (R. pp. 37, 47, 50, 67, 82, 83, 110, 117, 533, 545). The contractors have or claim no title or interest in the coal either before or after severance, and no right or power of sale or of other disposition of the coal. The *jus disponendi* thereof vests solely in respondents. (R. pp. 87, 97, 534, 539, 543). The coal is mined, loaded and shipped only as and when re-

spondents instruct the contractor (R. pp. 108, 534, 539, 543, 545). Respondents derive their title to the coal by grant from and in direct privity with the owners of the coal-bearing lands as follows: at the William-Ann mine from United Thacker Coal Company and the Cole & Crane Trustees; at the Chilton Block No. 1 mine from Dingess-Rum Coal Company, and at the Glamorgan mine from Glamorgan Coal Land Corporation. Neither the respondents nor either of the contractors has any stock or other interest in or control of the landowners. All of the parties to the transactions are separate legal entities, each is independent of the others and there are no interlocking relationships through directorships, stock ownerships or otherwise (R. pp. 68, 86, 126, 547).

The grant to respondents by United Thacker Coal Company and the Cole & Crane Trustees was made after operation of the William-Ann mine by the William Ann Company, the former lessee of the coal lands, (referred to in the marginal note on page 5 of petitioners' brief) had ceased and determined and after the lessors had repossessed the leased properties and acquired title by recapture to the mining equipment and other property formerly of the William Ann Company following default by the latter company under such former lease provisions (R. p. 64).

In the case of the Chilton Block No. 1 mine title to the coal is derived by respondents not by sub-lease from Chilton Block Coal Company but as lessee of Dingess-Rum Coal Company, the landowner (R. pp. 108, 118, 543). Prior to such lease to respondents this mine had been shut down for a period of ten or twelve years (R. pp. 34, 127).

Under each of the contracts the compensation paid by respondents to the contractor for the latter's work and service is at the rate of a stated but adjustable sum per ton of coal mined. Such sum reflects all of the cost of mining the coal plus a reasonable compensation to the contractor for his services and is adjustable with respect to cost factors beyond the control of the contractor. By each contract respondents are bound to adjust the stipulated per ton compensation rate to conform to fluctuations in wages, taxes and the cost of materials and in each case such compensation has been increased from time to time to meet increases in these costs (R. pp. 188, 195, 262, 269, 270, 272, 283, 300, 310, 538, 540).

The original rate of compensation per ton at the William-Ann mine was \$1.355. The present rate per ton being paid to the contractor under this agreement is \$1.637 per ton. The original rate of compensation per ton at the Glamorgan mine was \$1.55, but this has, pursuant to the contract, been increased to \$1.705. The original rate of compensation per ton at the Chilton Block No. 1 mine was \$1.15, and is now \$1.63 per ton. These sums are paid exclusively by way of compensation for the work and service of mining the coal and do not include the royalty paid to the land-owners.

The lease to respondents of the William-Ann mine coal-bearing lands and the contract with D. H. Pritchard, the contractor, for the service of mining the coal at that mine were originally made in May, 1934. The proposed arrangement was previously submitted by respondents to the National Industrial Recovery Act authorities and approved by such authorities as not

constituting an evasion nor contravening the price-fixing and other regulatory provisions of the applicable Code of Fair Competition set up under that Act* (R. pp. 35, 466, 487.) conference and correspondence with Donald Richberg). The agreements covering operation of the Glamorgan mine were made in July, 1934, and for the Chilton Block No. 1 mine in July, 1935.

* This Code set up a price-fixing and regulatory system which was substantially similar to and constituted the precedent and working model for subsequent stabilizing legislation, including the Act here involved. Vol. I, Codes of Fair Competition, p. 323 (published by NRA).

SUMMARY OF THE ARGUMENT.

I.

It not material whether respondents fall within the specific meaning of the exemption provision of Section 4-II(1), for the reason that the price-fixing and regulatory provisions of Section 4 as a whole do not in any event apply to the mining operations here involved. These operations are not within the scope of the Bituminous Coal Act at all, because the specific purpose of the Act was the amelioration of the depressed condition of the commercial coal industry and, with that end in view, its entire regulatory scheme is directed solely toward prices and competitive methods with respect to the sale or other transfer of title to coal as personal property constituting an article of commerce.

Since the operation of respondents' mines is carried out without any sale or transfer of title as between the respondents and their contractors, the Act has no field of operation. Respondents own the coal or the exclusive right to mine it by virtue of leases obtained from landowners who are entirely independent of and have no connection with either respondents or their contractors. Respondents have engaged the services of contractors to mine the coal, all of which is consumed in the operation of the railroad of which respondents are Receivers. The coal is mined only in such amounts and at such times as the respondents direct, and the contractors never at any time have any interest in or title to the coal nor any power to dispose of it. The transactions between respondents and their contractors therefore do not constitute com-

merce or trade but are simply service arrangements, and the contractors are the agency through which respondents operate their mines.

The coal here produced is captive coal as that phrase is generally understood, and such coal was omitted from the field of the Act with full Congressional knowledge and intent. The price-fixing provisions of the Act were not intended to apply and cannot be applied because there are here no sales and no prices.

Application in this case of the regulatory and price-fixing provisions, on the theory that the contractors are producers, would nullify the tax provisions, which are explicitly made to apply only to producers who either consume their coal or sell it, and here the contractors can do neither.

The Circuit Court of Appeals properly held that the Act has no application in this case, and its judgment should be affirmed on this ground alone.

II.

Since the Act specifically provides for court review of orders made by the Director, with specific authority in the court to affirm, reverse or modify any such order, it cannot be successfully contended that his determination is final. It is true that his findings as to the facts are made conclusive on review, but the determination here made by the Director, that respondents are not producers of the coal within the meaning of the exemption provided by Section

4-II(1), is not in any sense a finding of fact. It is a conclusion of law, or at least a mixed conclusion of law and fact, whereas the Act plainly limits the finality of the Director's findings to the domain of the facts.

The argument of petitioners that the court must defer to the judgment of the Director not only as to findings of facts but with respect to his interpretation and construction of the Act is in plain contravention of the language of the Act itself and goes far beyond anything ever held by this Court. It is in effect a request for judicial abdication, and even goes to the extreme of asserting that the decision of the Director need not be based on evidence in the record, because his assumed special knowledge of the intent of Congress is sufficient to set his judgment beyond review—undisputed facts to the contrary notwithstanding.

The Director based his decision upon his conception of the "contemplation and design of the Act," and it is therefore reviewable as a legal conclusion.

III.

Respondents are the producers of the coal within the meaning of the exemption under Section 4-II(1) of coal which is consumed by the producer. As the Circuit Court of Appeals held, there is no logical difference so far as the intent of this section is concerned between a consumer who owns the coal in place and mines it by employees or servants, and one who mines it as respondents do by contractors who in some respects

are not servants or agents within the meaning of the law of torts. Whether the contractors are called "independent contractors," "agents," or "employees" is totally irrelevant to the issue, since they have absolutely no independent control over the production of the coal. The relationship between respondents and their contractors is clearly an *ad hoc* agency with respect to the production of the coal, and as between the landowners and respondents, and as between the Government, the public and respondents, the latter are the controlling and responsible parties with respect to the mining, shipment and disposal of the coal. Thus, respondents, not the contractors, must account to the landowners, and respondents would be accountable to the Government for production taxes or for any violation of law relating to the disposition of the coal, such as the commodities clause of the Interstate Commerce Act, Sec. 1(8).

Sec. 17(c), which states that as used in the Act the term "producer" includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal, does not support the decision of the Director. The section is merely precautionary as to the forms of organization under which coal may be produced, and obviously could not have intended to mean that all persons who are engaged in the mining operations are "producers," even if they have no title to or interest in the coal and cannot mine it except under the control and direction of the owner. The term "includes" cannot be construed to intend the exclusion from the category of producers of the real party in interest, the owning and controlling party in the production of the coal. "Producer" is generally

understood to mean, and was used by Congress to describe, the person who owns the coal, causes it to be mined, and controls its disposition—whether by sale or consumption.

The phrase "engaged in the business of mining coal" as used in Section 4-II(1) is not used in a technical jurisdictional sense but with reference to the whole economic activity or enterprise of coal mining, including the sale or disposal of the product. Since respondents absolutely control the mining of the coal and pay all the costs, they are engaged in the business and they are producers within the intention of this section.

To hold that the contractors, and not the respondents, are producers of this coal, would remove both parties from the application of the tax provisions of Section 3, a result which the Court will avoid in the absence of unambiguous and compelling language. The taxes levied by both Section 3(a) and Section 3(b) of the Act are payable only by producers who either consume or sell the coal which they produce, and a construction of the Act whereby its regulatory provisions are made to apply to one who cannot either sell or consume the coal would be self-contradictory and self-defeating.

The arrangements whereby respondents produce their railroad coal are not in any sense contrary to the intent and purposes of the Act. The particular methods and contractual arrangements whereby the owner of the coal has it extracted from the mine are not the objects of Congressional solicitude or regulation. The conditions sought to be remedied by the Bituminous Coal Act were not caused or contributed

to by, and did not arise out of, the mechanical details of the operation of coal mines but were the result of unrestricted and unregulated competition in the production of coal for and its sale in the commercial market. These conditions were caused by the uncontrolled and uncoordinated operation of the various elements of the laws of supply and demand. Here supply and demand are merged in one ownership and control and no competition or failure of coordination can exist. These operations are therefore entirely outside the social and economic horizon of the legislation.

IV.

If construed to apply to the operating arrangements at respondents' mines, the Act is beyond the power of Congress under the Commerce Clause, and if within the general delegation of that clause, is a violation of the Fifth Amendment as applied to respondents. The activities of the contractors here are limited to the extraction of coal from the mines, an essentially local matter. The attempted interference with such activities by a scheme of regulation directed toward the prices and practices involved in interstate commercial transactions is not a means logically or factually related or appropriate to the end sought. Congress has not found or declared the existence of any connection between arrangements such as these or any other form of captive production and the evils to be remedied, and none can reasonably be found. Since the type of regulation asserted by petitioners as intended by the Act bears no reasonable relation to the exercise of the power of Congress over interstate commerce, it is invalid.

For like reasons the application of the Act here would deprive respondents of their property without due process of law. Enforcement of the price-fixing provisions of the law so as to require additional payments by respondents to the landowners from whom they acquired the coal or to the contractors would arbitrarily deprive respondents of their property and unjustly enrich the others.

Petitioners assert that respondents are required by the Act to pay the applicable commercial coal prices by apportioning the total amount of that price between the landowners and the contractors, although the Act prescribes no such apportionment and no standards for the guidance of administrative authorities in regulating or approving such split payments are laid down either by statute or by any administrative orders or rules. No logical basis for such an apportionment has been or could be suggested.

Commercial prices are fixed under the Act with relation to average production, administrative and selling costs over wide areas, and reflect items of cost which are not present in these operations and which are totally unrelated to the value of the mining rights or of the services rendered by the contractors. To require respondents to pay over large sums so calculated out of the receivership estate would not further any legitimate aim of Congress and would in fact not support or effect the declared purpose of the Bituminous Coal Act, and such a requirement would therefore contravene the Fifth Amendment.

ARGUMENT.

I.

Section 4-II of the Act applies only where there is a sale of or other transfer of the title to the coal by the producer and to transactions or commerce in such coal. The Act accordingly has no application to the coal involved in this case.

Throughout the Bituminous Coal Act of 1937 there is unmistakable language evidencing the intent of Congress to regulate only those transactions and commerce in coal which involve a sale or other transfer of title to such coal by the producer between its removal from the ground and its consumption. The preamble (or Section 1) of the Act is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; that there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

The use of such expressions as "sale and distribution," "practices and methods of distribution and marketing," "regulation of the prices thereof" and

"of unfair methods of competition therein" state the whole philosophy of Section 4 of the Act, which clearly concerns itself solely with commercial transactions or, stated otherwise, those transactions in which there is a transfer by the producer of title to his coal.

Other sections of the Act give abundant support to this conclusion.

In Section 2(b) of the Act provision is made for the appointment of a Consumers' Counsel, whose duties are relevant to those transactions only which involve commercial and market practices which affect the general consumer.

The following language emphasizes the Act's pre-occupation with commercial transactions:

"Marketing" the title of Part II; provision in subdivision (a) of this Part II for the report by Code members of "spot orders," for the filing by Code members of copies of all contracts "for the sale of coal," for proposals required to be made by the respective District Boards of "minimum prices free on board transportation facilities at the mines * * * so as to yield a return per net ton for each District in a minimum price area"; provision that the minimum "prices" so proposed shall reflect, as nearly as possible, the relative "market value" of the various kinds, etc., of coal * * * and shall have due regard to the interest of the "consuming public"; provision that the weighted average of the total cost determined by the Commission and transmitted to the District Boards shall be taken as the basis for the proposal and establishment of minimum "prices" for coal.

Likewise, the provisions in Section 4(e) that no coal subject to the provisions of Section 4, shall be "sold or delivered or offered for sale" at a *price* below the minimum or above the maximum therefor established by the Commission, and the "sale or delivery or offer for sale of coal" at a price below such minimum or above such maximum shall constitute a violation of the Code; that the making of a "contract for the sale of coal at a price" below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the Code; that from and after the date of approval of the Act until "prices" shall have been established pursuant to sub-sections (a) and (b) of Part II of Section 4, no contract "for the sale of coal" shall be made providing for delivery for a period longer than thirty days from the date of the contract, and that no contract shall be made "for the sale of coal" for delivery after the expiration date of the Act at a price below the minimum or above the maximum therefor established by the Commission and in effect at the time of making the contract.

Every phrase points clearly and unmistakably to the intent of Congress to limit and restrict the application of the provisions of Section 4 of the Act to commercial transactions in coal *which is sold or, the title thereto otherwise transferred by the producer of the coal.*

The enumerated practices with respect to coal, and which Section 4(i) of the Act provides shall constitute violations of the Code, all, either in express terms or by clear implication, relate and apply only to practices in or incident to *sales of or other transfers of*

title to the coal by the producer, and are also indicative of the intent of Congress to so limit and restrict the application of Section 4 of the Act.

That Section 4 of the Act applies only to coal which is sold or the title thereto otherwise transferred by the producer is clearly recognized and confirmed in the provisions of Section 4-A of the Act, which is supplementary to Section 4. Section 4-A expressly provides in effect that when the Commission shall have found the transactions in coal in intrastate commerce directly affect interstate commerce, "thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of Section 4."

Transactions here considered involve personal services and not trade in coal as an article of commerce.

Sections 4 and 4-A of the Act relate and apply only to transactions *in coal* as an article of commerce. The transactions here involved between the respondents and the contractor whereunder the contractor performs the work and service of digging the coal and is paid therefor by the Receivers are not transactions *or commerce in coal* but are contractual arrangements *for work and service* and clearly involve only local activities. The fact that the work and service consists of the extraction and loading of coal which is owned, shipped by and to and consumed by respondents and in which the contractor has no title or interest, cannot transmute such contractual arrangements into a *transaction in coal* or into *commerce in coal*.

Captive coal is not a factor in the problem sought to be ameliorated by the Bituminous Coal Act.

The Congress was not at all concerned with the production of what is universally known as captive coal and did not attempt to regulate in any way the cost or method of production of such coal.

Petitioners object (Brief, pp. 47, 48) to the use by the Circuit Court of Appeals of the common phrase, "captive coal," saying that it is a "loose" term, not used in the Act. The term may be loose in that it applies to the coal produced by or under the control of large industrial consumers for their own use, in a number of different ways. It is well known in the trade, however, and simply means coal which does not reach nor directly affect the general market. Thus statistics of production in the industry are compiled under the two headings, "captive tonnage" and "commercial tonnage."

It was not necessary to use it in the Act since the legislation is only directed toward commercial production, and, as Mr. Hosford said, "Inasmuch as captive coal does not affect the commercial market, it has been disregarded."*

Petitioners correctly assume that Mr. Hosford's statement (R. p. 579) that "the price provisions do not apply to captive coal at all" is based upon the obvious fact that price provisions are incapable of being applied to such coal (Brief, p. 48). That is

* Testimony of Mr. Chas. F. Hosford, Jr., Chairman of Coal Commission established under National Coal Conservation Act of 1935 and first Chairman of Bituminous Coal Commission established under Bituminous Coal Act of 1937, quoted by the court below (R. pp. 578, 579).

precisely the situation presented here, and it is the reason why Congress did not in the Act attempt it.

This Court, in sustaining the validity of the Act in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, explicitly recognizes the limitation of the scope and objectives of the Act to commercial transactions. The regulatory provisions are held to be within the power of Congress, because "these provisions are applicable only to sales or transactions within or directly or intimately affecting interstate commerce. The fixing of prices, proscription of unfair trade practices, establishment of marketing rules respecting such sales of bituminous coal constitute regulations within the competence of Congress under the commerce clause." 310 U. S. 393.

"It was the judgment of Congress that price-fixing and the elimination of unfair competitive practices were appropriate methods for prevention of the financial ruin, low wages, poor working conditions, strikes, and disruption of the channels of trade which followed in the wake of the demoralized price structures in this industry." (Ib., p. 395).

Thus, this Court recognizes what is made plain in the preamble and body of the Act, and in fact is a matter of common knowledge, namely, that the competition for the general market resulting in price cutting and various unfair methods of competition was the evil sought to be remedied. The production of coal at these railroad mines is not a part of the competitive picture. There are no unfair methods of competition in the mining of the coal, because there is no competition, and there are no prices, because there

are no sales. The only tangible bases for the Act are not present in this case.

Whatever, academically considered, may be the power of Congress over the production and interstate transportation or other transactions in coal, the regulation undertaken by that body in the Bituminous Coal Act of 1937 plainly contemplates a sale or other transfer of title *by the producer* before the coal comes within the scope and purview of Section 4-II of that Act. The Director's conclusion completely ignores the fact, as held by the court below in this case and as recognized by this court in *Sunshine Anthracite Coal Company v. Adkins*, *supra*, that the price regulations of the Act relate or apply only to coal or transactions in coal in which a sale or other transfer of title to the coal *by the producer* occurs. Upon this point the decision by the court below states:

"The mistake of the Director was due to considering the various incidents of the process of the production and ignoring the vital element of price regulation. There is manifestly nothing upon which price regulation can operate where no price is possible; and no price is possible where *no sale can possibly take place* and all that is involved is the mining of coal under contract for the owner." (R. p. 577). (Emphasis ours.)

If, as respondents contend and as held by the court below, Section 4-II of the Act applies only to coal which is sold or the title thereto otherwise transferred *by the producer*, then in determining the right of respondents to the exemption claimed the question of whether the coal is produced by respondents or by the contractors becomes wholly immaterial, for obviously

no sale or transfer of title by respondents to themselves of their own property can occur and the clear and uncontradicted evidence as shown by the record is that no sale or transfer of title to the coal by the contractor takes place. (See pp. 56-59, *infra*.)

The judgment of the Circuit Court of Appeals should be affirmed, therefore, on this ground alone. Petitioners assert that "even had Congress intended the Act to apply only to sales, that fact alone would scarcely make respondents the producer of the coal which they consume and consequently would not bring them within the exemption contained in Section 4-II(1)" (Brief, p. 44). This appears to carry the implication that petitioners would attempt to regulate respondents' business even if convinced that Congress had no such intention, but however that may be, the proposition misconceives the scope and intent of Section 4-a, which does not limit exemptions to those specifically allowed under the terms of Section 4-II(1). The language of Section 4-A is that "Any producer believing that *any* commerce in coal is not subject to the provisions of Section 4" may apply for exemption. If applications were to be limited to coal entitled to exemption only under the terms of Section 4-II(1), Congress could easily have said so.

In *Northwestern Imp. Co. v. Ickes*, (CCA 8th), 111 Fed. (2d) 221, the Court sustained the denial of an exemption sought under Section 4-A on the ground that the transactions involved were local matters not subject to regulation under the commerce clause. The construction of Section 4-II(1) was not involved, as exemption was not claimed on the ground that the railroad was the producer, but no question was raised as to the propriety of the application.

The tax provisions of the Act compel the conclusion that the regulatory provisions have no application where no sale or transfer of title takes place.

It is argued for petitioners that the absence of a formal sale or transfer of title is immaterial (Brief, pp. 43-46). In support of this it is pointed out that the Act makes frequent use of other phrases or terms, such as "sale or other disposal," "delivery," and "transactions." That they all mean transfer of title to coal as an article of commerce from the producer to the consumer is made abundantly clear by Section 3. Section 3(a) provides that:

"There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of 2,000 pounds.

"The term 'disposal' as used in this section includes consumption or use (whether in the production of coke or fuel or otherwise) by a producer and any transfer of title by the producer other than by sale."

If respondents are not the producers, as petitioners say they are not, then this tax is owed by nobody, for it becomes due only when coal is sold, consumed, or its title otherwise transferred by the producer. Since respondents consume it, if they are not its producers it can only be taxed if the person who is the producer sells or otherwise transfers title to it, which the contractor here is unable to do because he never has any right, title or interest in the coal to sell or transfer.

Section 3(b) levies a tax, in identically the same

terms as Section 3(a), in the amount of 19½ percent of the sale price or market value of the coal, upon all coal which is subject to the price-fixing and regulatory provisions of Section 4 of the Act, unless the producer against whom the tax is levied is a member of the Code.

This tax is, of course, a penalty, and constitutes the sole sanction behind the regulatory provisions of Section. 4. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 389, 392.

Here again the tax would fall, under petitioners' contention, and we would have the anomalous situation of an attempted application of the regulatory provisions the violation of which would result in no applicable penalty. As this Court said in the *Sunshine* case (p. 392):

"The essential sanction of the Act would then disappear and its effectiveness would be seriously impaired. That alternative will not be taken where a construction is possible which will preserve the vitality of the Act and the utility of the language in question."

It is therefore clear that the regulatory provisions embodied in Section 4 of the Act can have and are not intended to have any application in the situation presented by this record, and that an affirmance of the judgment below does not depend upon the decision of the questions hereafter discussed.

The general intent and scope of the Act outlined above requires the conclusion that respondents are necessarily the producers of the coal within the meaning of Section 4-II(1). Before discussing that question in further detail, however, we will take up petitioners' contention that the Directors' determination on the point is conclusive.

II.

**The Director's conclusion as to the scope of the Act
has no finality either under the terms of the statute
or the decisions of this Court.**

/ Petitioners' argument that the Director's "determination" is conclusive, if supported by substantial evidence, is directed to the conclusion reached by the Director that respondents are not producers within the meaning of Section 4-II(1). As we have pointed out, the decision of this question one way or another is not necessarily determinative of the case. The Director's conclusion on this point was demonstrably wrong, however, and we think it clear that his conclusion was properly and correctly reviewed by the court below.

The general provision of the Act with respect to review is contained in Section 6(b), the pertinent language of which is:

"(b) Any person aggrieved by an order issued by the Commission (Director) * * * may obtain a review of such order in the Circuit Court of Appeals * * *. The Court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part * * *. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

In addition to this general provision, Section 4-A, which deals with applications for exemption, concludes with the mandate that:

"Any applicant aggrieved by an order denying or otherwise disposing of an applica-

tion for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of Section 6."

Counsel for petitioners refer at the beginning of the argument (Brief, p. 15) to a "statutory mandate that the Director's *decision* is binding if supported by substantial evidence." The statute contains no such mandate. Not the Director's *decision*, but only his "findings as to the facts" are made conclusive. His decision is presumably based on his findings of facts (although petitioners argue that even this should not be required (Brief, p. 23; *infra*, p. 00), but the decision, as distinguished from the findings of fact upon which it is based, is given neither *prima facie* nor final conclusiveness by the statute.

Petitioners, confronted by a statutory provision authorizing review of orders of the Director, the scope of review being limited only to the extent that the "finding * * * *as to the facts*" shall be conclusive if supported by substantial evidence, proceed to argue that this limitation upon the scope of review is not sufficient, that Congress should have gone further, and that the Court should read into the Act something that is not there, namely, an intention on the part of Congress to turn over to a bureau the whole field of interpretation and application of the law. The basis of the argument (p. 12) is that the "administrative tribunal is more, rather than less, expert than the judge, *not only in the solution of factual problems, arising in its specialized field, but also in its familiarity with the background and purpose of the statute and with the practical consequences which will ensue from any particular construction.*" The Courts, as we understand

their function, are charged with ascertainment of the scope and meaning of the law. If the terms of a statute compel a particular construction, its practical consequences are for the consideration of the law-making body and not for the interpreter. The doctrine advocated is an invitation to unrestrained administrative legislation.

This goes far beyond anything held in *Shields v. Utah Idaho Central Ry.*, 305 U.S. 177; *Rochester Telephone Corp. v. U. S.*, 307 U. S. 125, or *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, cited by petitioners, each of which expressly recognized that to the courts belong the determination whether the Commission's order "departed from the applicable rules of law," and whether "its finding had a basis in substantial evidence or was arbitrary and capricious."

If the doctrine advocated by the Government were recognized, there would be no field left for the review provided for in Sec. 6(b), which expressly states that the Court shall have authority to "affirm, modify and enforce, or set aside, such order in whole or in part." If the Board can interpret the Act, and its interpretation is conclusive, there is nothing left for the reviewing Court to decide.

In the *Shields* case, the Interstate Commerce Commission was "authorized and directed upon the request of the Mediation Board or upon the complaint of any party interested to determine after a hearing whether any line operated by electric power" is within the exception of interurban electric railways.

The Court points out that Congress *did not define* the term "interurban." Since Congress could decide

that any interstate carrier was subject to the Railway Labor Act, whether interurban or not, it was free to leave to the Commission the decision of questions of fact as to whether the railway came within the broad exception. Congress having admitted power to include interstate carriers, "no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned."

In the instant case the Act, viewed as a whole, does contain a definition or limitation as to its scope, and it contains no such express direction that the administrative tribunal shall exercise its discretion as to what matters are within that scope.

The field of operation of the statute is by plain definition as well as by implicit construction limited to the commercial sale of coal in the national marketplace, and it necessarily follows that the Director is without authority to widen the field to include activities outside the ambit of Congressional action.

There are two additional and compelling reasons why the result reached in the *Shields* case cannot apply here.

The first is that here we have a constitutional question the determination of which depends upon the conclusion as to the scope of the Act as applied to respondents, and under settled principles the reviewing court must decide that question for itself.

Ohio Valley Water Co. v. Ben Aron Borough,
253 U. S. 287;

*Bluefield Waterworks & Imp. Co. v. Public
Service Commission*, 262 U. S. 679, 689;

Phillips v. Commissioner, 283 U. S. 589, 600;

Crowell v. Benson, 285 U. S. 22, 54-61;

St. Joseph Stockyards Co. v. U. S., 298 U. S. 38, 51-52.

The second is that in the *Shields* case Congress definitely directed the Commission to determine the question of the scope of the Act within the general framework established, whereas here there has been no such specific delegation. On the contrary, the Congress not only made general provision in Section 6(b) of the Act for review by the courts of administrative orders, but in order to make doubly certain the right of persons situated as are respondents to judicial determination of any contested application of the substantive provisions of the Act to them, it added to the section covering applications for exemption this unambiguous mandate:

"Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided for in subsection (b) of Section 6." Sec. 4-A; 15 U. S. C. A., Secs. 834, 836.

The argument of the Government (pp. 20-22) that decision by the Director of mixed questions of law and fact should be conclusive, even where, as here, the determination involves a conclusion as to the substantive scope of the statute, besides running counter to the express language of the Act, has been repeatedly rejected by this Court, in decisions involving the review of the judgments of State courts, where the scope of

review is by judicially established rule the same as that laid down in the Coal Act, namely, that this Court will accept the facts as found,

"This Court may, of course, upon writ of error to a State court examine the entire record, including the evidence, to determine whether what purports to be a finding upon questions of fact is so involved with and dependent upon questions of Federal law as to be really a decision of the latter."

—Brandeis, J., dissenting, *Ohio Valley Water Co. v. Ben Aron Borough*, 253 U. S. 287, 298, citing *Kansas City Southern Co. v. Albers Commission Co.*, 223 U. S. 573, *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 233 U. S. 655; *Graham v. Gill*, 223 U. S. 643.

The same qualification applies to the rule of finality of administrative findings with respect to statutory review of Federal tribunals. *St. Joseph Stockyards Co. v. U. S.*, 298 U. S. 38, 74.

The familiar limitation on the scope of review, and the one obviously contemplated by Sec. 6(b) of the Coal Act, is simply that the Court will not undertake to pass upon the relative weight of conflicting evidence. *Oregon Ry. & Nav. Co. v. Fairchild*, 224 U. S. 510, 528.

The same traditional limitation of the scope of review applies in the review of decisions of the Board of Tax Appeals under the Revenue Acts, *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 600, and in the review of actions by other administrative tribunals, such as the Federal Trade Commission, 15

U. S. C., Sec. 45*; the Federal Power Commission, 16 U. S. C., Sec. 813; the Secretary of Agriculture—cf. *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38.

In none of its decisions with respect to these tribunals has this Court, so far as we are aware, abdicated its judicial function to determine the proper scope and applicability of the substantive law, as petitioners would have it do here.

The distinction between determinations of evidentiary or circumstantial facts which the Courts are bound to accept, and ultimate conclusions, whether of fact or law or mixed, which will be reviewed is clearly exemplified by the tax cases. The pertinent sections of the Revenue Acts, now embodied in Section 1141 of the Internal Revenue Code, have for years provided that the Circuit Court of Appeals shall have "exclusive jurisdiction to review" the decisions of the Board of Tax Appeals, with the "power to affirm or, if the decision of the Board is not in accordance with law, to modify or reverse the decision."

The scope of review under this law is well illustrated by the case of *Helvering v. Tex-Penn Oil Company*, 300 U. S. 481, in which this Court affirmed a decision of the Third Circuit Court of Appeals which had reversed a decision of the Board of Tax Appeals (28 B. T. A. 917) determining deficiencies in large amounts against the Oil Company for the year 1919. The basic facts were that the Tex-Penn Oil Company in that year transferred all its assets to the Transcontinental Oil Company in exchange for certain

* *Goodyear Tire & Rubber Co. v. Fed. Trade Comm.*, 101 F. (2d) 620, 624, cert. den. 308 U. S. 557; *Fed. Trade Comm. v. 'Alaladum Co.*, 283 U. S. 643.

shares of stock. The Internal Revenue Department asserted that the consideration for the transfer included not only the stock but also \$350,000 in cash. The Board made elaborate findings of what it called "circumstantial facts" upon the basis of which it concluded in what it termed an "ultimate finding" that the consideration for the transfer included cash and hence the transaction was not one in which assets were transferred for stock alone. The Board accordingly held that the transaction did not come within a provision of the Revenue Act providing, in substance, that no gain or loss shall be deemed to occur in cases in which corporate assets are transferred solely for stock.

In reviewing the Circuit Court of Appeals' decision, this Court said:

"The foregoing includes the substance of all the findings of circumstantial facts material to the question under consideration. They must be taken as established if supported by substantial evidence. *Helvering v. Rankin*, 295 U. S. 123, 131; *Old Mission Co. v. Helvering*, 293 U. S. 289, 294; *Burnet v. Leininger*, 285 U. S. 136, 138, 139; *Phillips v. Commissioner*, 283 U. S. 589, 600; *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716. There is no suggestion that they are not amply sustained. In addition to and presumably upon the basis of these findings, the Board made its 'ultimate finding.' And upon that determination it ruled that the transaction was not within the non-recognition provisions of Section 202(b). The ultimate finding is a conclusion of law at least a determination of a question of law and fact. It is to be distinguished from the findings of primary, evidentiary, or circumstantial facts:

It is subject to judicial review and, on such review, the Court may substitute its judgment for that of the Board. *Helvering v. Rankin*, *ubi supra*." 300 U. S. 481, 490, 491.

The Court then pointed out that the circumstantial facts found by the Board did not support at least two of the Board's ultimate findings, and affirmed the action of the Circuit Court of Appeals in reversing the Board.

There are, of course, matters primarily within the executive domain, such as alien deportation and use of the mails*, which have been left to conclusive determination by designated officers or tribunals, and "with respect to them, the function of the Courts is not one of review but essentially of control—the function of keeping them within their statutory authority." Brandeis, J., dissenting in *Crowell v. Benson*, 285 U. S. 22, 89, 90.

Shields v. Utah Idaho Central Ry. and the *Bassett* and *Rochester Telephone Co.* cases, insofar as they extend the rule of administrative finality beyond that established in the tax, trade commission, and other cases above cited, clearly fall within this limited and special class of cases.

Even in such cases, however, it is held "that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer"—*ibid.*, p. 91.

* Cf. *Bates & Guild Co. v. Payne*, 194 U. S. 106, cited in brief for petitioner at p. 24, and *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 104.

Here it is impossible to assert that the function of the Court is limited to a generalized control over the operation of the administrative body for the purpose of keeping it within bounds*, since the statute in two places charges the Court with the obligation to *review* the tribunal's decisions.

Congress has made specific provision for review in the Bituminous Coal Act, and there is accordingly no room for the speculations indulged in by counsel for petitioners (Brief, pp. 20-26) as to what Congress might be "supposed" or "assumed" to have intended with respect to the hypothetical desirability of freeing an assumed expert in all things both factual and legal from judicial supervision. The result of the doctrine here urged upon the Court would be "to establish a government of a bureaucratic character alien to our system," *Crowell v. Benson*, 285, U. S. 22, 57. Fortunately, Congress has foreclosed the possibility in this case.

The argument of the Government here goes to the astonishing extreme of asserting that the decision of the administrative body, the sanctity of which is expressly confined to its "findings as to the facts," should be accepted by the Courts "*irrespective of whether based on facts in evidence or on familiarity with the legislative and practical setting of the particular statutory provision involved*" (Brief, pp. 22, 23). Any such totalitarian conception of the obligations of fair play as between Government and citizen would be

* Even if jurisdiction in this case were so limited, the Court would have to decide whether the Director had exceeded the statutory authority by bringing within its scope matters left outside the scheme of the statute, and whether the determination was rationally supported by the evidence.

shocking even in the absence of the many decisions of this and other courts condemning judgments based upon considerations unknown to the person affected—
cf:

I. C. C. v. L. & N. Ry., 227 U. S. 88, 93;
Chicago Junction case, 264 U. S. 258, 263;
U. S. v. Abilene Southern Ry., 265 U. S.
 275, 288;
Crowell v. Benson, 285 U. S. 22, 48.

Thus the doctrine of bureaucratic infallibility is sought to be extended from the field of evidentiary fact-finding to which it is, in this Act at least, specifically confined by Congress itself, to the entire legal and judicial territory of the law involved. Each Act of Congress would thus be surrounded by and isolated within its own little priesthood, whose sacred pronouncements would be beyond the reach of profane criticism by the courts of the country.

Although the Director's determination that respondents are not producers was stated both as a finding of fact (No. 13, R. p. 547) and as a conclusion (R. p. 549), it is obvious that the determination is not in any sense a finding of an evidentiary or circumstantial fact. Indeed, the Director himself recognized this in his statement that "In view of these many important facts *I am of the opinion* that Applicants are not a producer of coal *within the contemplation and design of the Act.*" (R. p. 549). The determination is thus plainly based upon the Director's interpretation or conception of the scope of the Act as applied to the facts disclosed by the record, a determination clearly within the judicial province.

III.

Respondents are producers of the coal which they consume within the meaning of the exemption contained in Section 4-II(1), and the Director's decision to the contrary is without any rational basis in the record.

The court below correctly held that respondents are both the producers and consumers of the coal within the meaning of the exemption provisions of Section 4-II(1) of the Act. The part of its opinion on this point begins on page 579 of the Record. In substance, the Court said that it obviously makes no difference, so far as the objectives of the Act are concerned, whether the owner of coal in place, or of the exclusive right to mine it, has the coal extracted by servants or by contractors; that if the railroad were to sell this coal on the market, which it has a perfect right to do, it would clearly be subject to the Code and price-fixing provisions, since that would be the first sale after production; that the railroad does in fact pay the cost of mining the coal; and that the contractor is not of the class sought to be protected by the Act since he has no right or power either to mine or sell the coal.

The Circuit Court of Appeals cited (R. p. 530) in this connection the case of *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, 103 F. (2d) 124, which held that coal mined for the Rock Island Railroad by a corporate subsidiary was exempt under Section 4-II(1), for the reason that the subsidiary acted merely as the agency by which the railroad consumer produced the coal.

The respondents, like the trustees of the Rock Island, can produce coal for the use of the railroad only by agents. The fact that the agency through which the coal acquired by the respondents from the landowners is produced for their use is an independent contractor rather than a controlled subsidiary does not and can not affect the principle that where the railroad is the consumer of the coal it is none the less the producer where it utilizes some outside agency to do the mining.

The present case is a stronger one for the exemption than was that of the Consolidated Indiana Coal Company because here the contractor has no interest whatever in the coal which is mined, since it belongs to respondents *ab initio*, whereas in that case title to the coal was in the Coal Company and passed to the Railway only upon delivery.

Section 17(c) does not require or justify denial of the exemption.

The conclusion of the Director that the Receivers are not producers of the coal is based upon the erroneous assumption, rejected by the court below, that the question of whether one is a producer depends in turn upon whether he is engaged directly and physically "in the business of mining" the coal. This assumption is based upon the language of Section 17(c) of the Act, which states that as used in the Act "the term 'producer' includes all individuals, firms, associations, corporations, trustees and receivers engaged in the business of mining coal." As held by the court below (R. p. 579), the language of Section 17(c) plainly does not justify the restrictive application of it adopted by

the Director, who assumes that the section constitutes an all-inclusive definition of the term "producer" as used in Section 4-II(1). The word "producer" is used throughout the Act and in many different contexts, and it is clear that Section 17(c) was intended not as an all-embracing definition of what circumstances would constitute a given operator a producer but to make plain that a producer engaged in the business of mining coal would be included in and subject to the various applicable provisions of the Act. The purpose of the section was to extend the coverage of the term "producer," not to limit it.

The use of the term "includes" obviously excludes a construction that the definition of "producer" in this section is all-embracing.

The word "producer," as used in Section 4-II(1) of the Act, is of broader signification and is employed therein having reference to all of the provisions of the Act. The Act applies to the two following classes of coal:

- (i) Coal owned in place and after its extraction consumed by the same owner thereof;
- (ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3—the tax section of the Act. It seems plain that coal exempted by virtue of Section 4-II(1) of the Act includes coal of the first above-stated class which is produced either by the owner thereof personally or through agencies or instrumentalities employed by such owner.

Coal produced personally by the owner in place or through such agencies or instrumentalities is subject to the tax levied by Section 3(a), as we have pointed out (*supra*, p. 26), and the railroad has regularly paid the tax as producer of this coal.

If the position of the Director that the definition of the term "producer" in Section 17(c) of the Act excludes respondents here is correct, then, as we have demonstrated, the coal produced at these three mines would be exempted from the provisions of Section 3 of the Act. The construction urged by respondents, that the definition of "producer" in Section 17(c) of the Act is *not* all-inclusive, and that Congress intended by Section 4-II(l) to exempt from Section 4-II coal which is consumed by the owner and produced for him by agencies or instrumentalities employed by such owner, avoids the anomalous situation which the construction contended for by petitioners would produce, and harmonizes, with the clear legislative intent that coal owned both before and after severance by the same owner and produced either by such owner himself or through agencies or instrumentalities employed by him is within both Section 3—the tax provisions, and Section 4-II(l)—the exemption provisions, of the Act.

That Section 17(c) of the Act is inclusive rather than restrictive in its effect is apparent from other sub-sections of Section 17, which use the proper word "means" where complete definition is intended, and the word "includes" where partial definition is intended.

Section 17 provides:

"SEC. 17. As used in this Act—

(a) The term 'coal' means bituminous coal.

(b) The term 'bituminous coal' includes all bituminous, semibituminous, and sub-bituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British Thermal Units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term 'interstate commerce' means commerce among the several State and Territories, with foreign nations, and with the District of Columbia.

(e) The term 'United States' when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia."

It would not be seriously contended that if the definition in Section 17(b) had read "bituminous coal includes semi-bituminous, subbituminous and lignite coal" other coal properly classifiable as bituminous coal would have been excluded and only the types of coal mentioned in that paragraph are subject to the Act. Yet petitioners seek to have this Court exclude a group of "producers" who are not mentioned in Section 17(c) but are included in Section 3 from the exemption provisions of Section 4-II(l) of the Act.

Language similar to that of Section 17(c) is used in Section 17(e), but, we ask, would the individual States be excluded if this paragraph had read:

“(e) The term ‘United States’ when used in a geographical sense includes the Territories of Alaska and Hawaii, and the District of Columbia”?

Sections 17(a) and (d) clearly show what definitions Congress intended to make all-inclusive. In each of these subsections the word “means” makes it clear that the definition is all-embracing. The absence of that word in Section 17(c) just as forcefully demonstrates that the definition of the term “producer” in Section 17(c) is not all-embracing.

The contractors are the agencies whereby the railroad mines its coal. Whether the relationship is strictly one of principal and agent is immaterial in this case.

Petitioners argue at considerable length (Brief, pp. 37-43) that the contractors were not the agents of respondents because they were “independent contractors.” We think it clear that the question whether the contractors are independent or not is irrelevant to our problem since even an independent contractor is an agent for the end for which he is employed, and respondents’ contractors are the agencies through which respondents obtain the coal from their mines.*

* *Consolidated Indiana Coal Co. v. National Bituminous Coal Commission*, supra; *Oliver Iron Mining Company v. Lord*, 262 U. S. 172; *Rothschild v. Northern Pacific Railroad Co.*, 68 Wash., 527; *Galeston Causeway Construction Co. v. Galveston H. & S. A. Ry. Co.*, 284 Fed. 137, affirmed 287 Fed. 1021 (CCA 5th, cert. den. 262 U. S. 747, *Agency Restatement*, Vol. 1, p. 9, et seq.; *Foss-Hughes Co. v. Lederer*, 287 Fed. 150.

That the exemption is intended to include coal produced through independent agencies or instrumentalities as well as that produced directly or personally must be assumed, for otherwise the operation of the exemption provision would be unfair and discriminatory in that it would grant the exemption only to coal produced personally by the owner and would deny it to an owner identically situated who chose to produce the coal through a different or independent agency.

The evidence is clear and uncontradicted that the coal here involved is being mined solely for the railroad's own use and under its orders. This being the case, the relationship between respondents and their contractors must of necessity be one of principal and agent. The subordination of the absolute dominion over the article involved is the factor that determines whether or not the one who has custody of the article is an agent, not the nature of the contract between him and the one who has such absolute dominion. So long as respondents' leases are in force they alone can mine or order mining done on the land under lease. The contractor is without power to extract legally one pound of coal from respondents' mines should they see fit to withhold their consent. Necessarily, therefore, as between respondents and the contractors there is an agency relationship *ad hoc*.

Great emphasis has been laid upon various sections of the contracts to demonstrate the lack of control of respondents over the activities of the contractors. It must be remembered, however, that the processes involved in the operation of a coal mine are highly complicated. The same control and direction

of activities by the principal that would be given over the activities of a section laborer or a porter would merely clog and hinder the efficiency of the contractor.

Moreover, in addition to absolute subordination of ownership, respondents do exercise control over the contractor. Paragraph 7(a) of the contracts (R. pp. 262, 300, 326 by reference) recognizes the right of the railroad to control salaries and rates of pay not within the purview of Exhibit "B" (R. p. 310). Likewise, paragraphs 9 and 10 of the contracts (R. pp. 265, 303, 326 by reference) reserve to the respondents control over the accounting, and over the amounts of coal to be mined.

No one would argue here that as between the railroad and the landowner, the contractors are not the agents of the former. Every pound of coal shot down from the faces must be accounted for by the railroad in royalties. Likewise, should any of the coal be sold on the market, as between the parties and the government the railroad would plainly be responsible for compliance with this and other laws, as the Circuit Court of Appeals said (R. p. 579).

In *Rothschild v. Northern Pacific R. Co.*, 68 Wash. 527, the railroad delivered a car of freight to a transfer company, which had been employed by the plaintiff (consignee) to remove the contents of the car to his warehouse. The employees of the transfer company opened the doors of the freight car and before any unloading was done the contents (alcohol in barrels) burst into flames and were destroyed. Plaintiff brought suit against the railroad company to recover the value of the destroyed merchandise. He asserted that the

transfer company was an independent contractor and that a delivery of the consignment to it did not bind him, as it was not his agent. The Court found for the railroad company and used the following language:

"The Court found that the Holman Transfer Company, whom the plaintiff appointed to receive the property, was an independent contractor, and it is argued that, because of this fact, the relation of principal and agent did not obtain between the plaintiff and the transfer company, and hence notice to the transfer company of the broken condition of the barrel was not notice to the plaintiff. But we can not accept this doctrine. It may be that the transfer company was so far an independent contractor that its acts of negligence resulting injuriously to third persons, even though while in the immediate work of making the transfer of the property, would not give such third persons a right of action against the plaintiff, but as between the plaintiff and the defendant the transfer company was clearly the plaintiff's agent with reference to receiving the property from the defendant and consequently notice to it was notice to the plaintiff."

In *Galveston C. Construction Co. v. Galveston H. & S. A. Ry. Co.*, 281 Fed. 137 (D. C. S. D. Tex.), affirmed 287 Fed. 1021 (CCA 5), certiorari denied 264 U. S. 747, a contractor agreed to build a causeway for a group of railroads. The contractor's compensation was fixed at a definite sum. He failed to complete the work for the contract price and railroads finished it at a cost far in excess of the price agreed upon. Before the railroads could file suit to recover from the contractor and his surety the two latter filed a bill in

equity to have the contract set aside on the ground that it was inequitable. The bill was dismissed by the Court. It appears also that the complainants endeavored to show that the contract did not make the contractor an independent contractor and he being an agent, his principals could not recover for the additional cost of the work. In this case the District Court said:

"I must advert briefly to the contention made so much of in complainants' brief that the contract did not make complainant an independent contractor, but merely an agent. Whether this is so or not it is unnecessary to decide, for there is no provision of law or of equity which prevents an agent from making an agreement to perform work upon a fixed compensation and upon a guaranteed cost."

The following statements contained in Restatement of the Law—Agency (Volume 1, p. 9, et seq.) are in conformity with these principles:

" 'Principal' is a word used to describe a person who has authorized another to act on his account and subject to his control. It includes, therefore, both a person who has directed another to act on his account in business dealings or to represent him in hearings or proceedings, but who has no control or right of control over the other's physical conduct, and also a person who employs another to act in his affairs, having such control or right to control over his conduct that the other is termed servant, whether or not he renders merely manual services. The word 'master' as defined in Sec. 2 is not used in contrast with the word 'principal,' but as included within it. Thus, the owner of a business is a principal not only

in regard to brokers who, as to their physical acts, are independent of his supervision, but also in regard to salesmen who conduct business transactions under supervision as to their conduct and who therefore come within the definition of servant, and likewise in regard to janitors whose jobs are confined to the performance of manual acts on the premises, under the owner's supervision. The word 'principal,' therefore, includes both persons who are masters and persons who are principals but not masters.

" 'Agent' is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are both those who, whether or not servants as described in Section 2, act in business dealings and those who, being servants, perform manual labor. *An agent may be one who, to distinguish him from a servant in determining the liability of the principal, is called an independent contractor. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions are agents, although, as to their physical activities, they are independent contractors.* Those are to be contrasted with others, such as clerks, train conductors, and other persons similarly employed, who are also agents although they fall within the category of servants. Likewise, the janitor of a building or the driver of a truck is an agent as that word is used in the Restatement of this Subject if he is employed under such conditions that he becomes a servant. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, the liability of a master for the torts of his servant is greater in extent than the liability of a principal for the torts of an agent who is not a servant

(see Secs. 219-255), and a master's duties to servants are different from those of a principal to agents who are not servants (see Secs. 472-528)." (Italics supplied.)

Section 2 of the Restatement defines the terms "master," "servant" and "independent contractor." The comment to that section discusses the distinction between servants and agents who are not servants, and says *inter alia*:

"The word 'servant' is used in contrast to 'independent contractor,' a term which includes all persons who contract to do something for another and who are not servants with respect thereto. *An agent who is not a servant is therefore an independent contractor when he contracts to act on account of the principal* * * *. While an agent who contracts to act and is not a servant is therefore an independent contractor, not all independent contractors are agents. * * * The word 'servant' is thus used to distinguish a group of persons for whose physical conduct the master is responsible to third persons. It is convenient to distinguish this group of persons from all other persons for whose physical conduct the employer is not responsible. These persons fall into two groups: those who are agents but do not respond to the tests for servants, and those who are not agents. For the purpose of determining whether or not the employer is responsible for their physical conduct, however, it is immaterial whether such persons are agents or are not agents. For this reason the term 'independent contractor' is used to indicate all persons for whose conduct, aside from their use of words, the employer is not responsible." (Italics supplied.)

Respondents are engaged in the business of mining coal within the meaning of Section 17(c).

Respondents may or may not be personally engaged in the business of mining coal, as that phrase is commonly used in the tax statutes and for purposes of obtaining jurisdiction, or otherwise, but they are certainly engaged in the business of producing coal through the agency of their contractors, and it is their responsibility. The fact that respondents and not the contractors are the motivating force of its production is the significant operative fact in this case.

The Director's opinion further attempts to support the conclusion that respondents are not "engaged in the business of mining coal" by the assertion that respondents do not pay the cost of mining the coal. He says:

"It is significant that applicants do not pay the costs of mining this coal. Virtually all costs are borne by the contractors. Thus the major item of cost, wages for labor, is paid by the contractors * * *. Thus the contractors * * * at their sole expense, perform all service work and furnish all labor, materials, supplies, machinery and equipment necessary or convenient for the performance of all the work * * *. And as a necessary result of this the risk of profit or loss incurred in mining the coal is assumed by the contractor." (R. p. 548).

This conclusion is not supported by any evidence in the record.

While it is true that the contractors bear all costs in the first instance, the fact is, as the Circuit Court

of Appeals held, that respondents are obligated by the contracts to pay all the costs of operation to their contractors except such as are within the contractors' control.* The expense of operation of each of the mines is met with funds paid by respondents to the contractor under the contracts for the work and service performed by the contractor, and such payments by respondents constitute the only source of revenue of the contractor from the operation of these mines.

The compensation paid by respondents for work and service performed by the contractor is in each case based on and fixed with reference to the costs of operation of the mine plus a reasonable compensation to the contractor. All of the contracts provide for adjustment in the compensation paid the contractor to cover increases or decreases in the major items of cost referred to by the Director as borne by the contractor, including specifically wages for labor, the expense of materials and supplies, and social security and other taxes where the increase in such cost is beyond the control of the contractor. Exhibit "B" (R. p. 310) to the operating contracts† is perfectly explicit on this point and it is difficult to perceive how the Director overlooked or misconceived the effect of its obligations. The risk of profit or loss, therefore, insofar as it may be affected by such major items of expense, is borne by respondents and not by the contractors. This is substantiated by the material increases in the rate of compensation at each of the mines referred to above (R. pp. 292, 299, 131, 88, 272, 538, 540, 543). *Supra*, p. 9.

* As to costs within the contractor's control, the railroad has and exercises the power of supervision. *Supra*, p. 46.

† All the contracts contain substantially identical provisions.

The completely erroneous conclusion that respondents do not pay the costs of mining pervades the entire opinion of the Director. Thus, in his opinion (R. p. 549), he states that the contractors "are paid a fixed sum per ton for coal of the specified quality." As pointed out, it is not true in the final sense that the contractors are paid a fixed sum per ton, except with reference to all the major cost factors as they may be fixed at any particular time. The sum is fixed only when and so long as the items of cost of mining the coal which are beyond the control of the contractor remain fixed and it is, of course, true, as pointed out by the Director, that the major costs of mining are reflected by wage scales, taxes and other costs which are variable and are not within the control of the individual operator. These costs are therefore paid by the railroad and not by the contractor, and the Director's finding as to this is without any support in the record. In every real sense respondents are responsible for and have undertaken the risks involved in the production of the coal, and they are "in the business" up to their ears.

In support of the contention that the Director's finding that respondents are not the producers of the coal is correct, petitioners argue that respondents differ from the "typical consumer only in that they hold leases on the coal lands and pay royalties directly to the lessor" (Brief, p. 28), and that "respondents are simply consumers who pay for the coal and its production separately instead of paying one price for both." (Brief, p. 29). The "only difference" is that here the consumer consumes his own coal! As for the assertion (p. 28) that respondents have "no investment risk"

in the mineral rights which they own, if that were a persuasive criterion here it would certainly exclude the contractors as producers, since they have no interest whatever in the lands or the coal. Moreover, it is not true. Respondents are firmly obligated to pay minimum royalties in the very substantial amount of \$29,000 per annum, as found by the Director (R. p. 545). Petitioners say this is not a risk because the leases are cancellable, but this overlooks the practical aspects of the situation here. The railroad is unable to take advantage of temporary price declines because obviously it could not afford to give up its captive mines merely to enable it to speculate on the permanence of a low spot market. This is demonstrated by the fact that the railroad still has the mines, although for long periods since it acquired them the market price for similar coals has been substantially less than the amounts paid to the contractors under these contracts. For instance, during the year 1937, and for ten months of 1938, the average net realization by commercial mines was more than 11 cents a ton below the cost of production.*

Petitioners have totally overlooked, moreover, an intensely practical and vitally important consideration underlying the operation of these mines by the respondents, and that is the imperative necessity of a stable, controlled and assured supply of coal of a known and acceptable quality to a large interstate railroad. A railroad, as is well known, cannot continually shift from one type or grade of coal to another without encountering financial and operating difficulties

* Third Annual Report under the Bituminous Coal Act of 1937, pp. 4, 5; G. P. O. 1940.

resulting from the necessity of making changes in locomotive blowers, grates, etc., and from the variable performance of engines using different coals.* Railroads do not and cannot buy "spot coal" in any appreciable quantities, and they cannot leave themselves in a position where they would have to shop around for fuel with which to keep the trains running.

The saving of costs by a bankrupt carrier is obviously a major consideration, but this motive, which is apparently viewed with suspicion and distrust by petitioners, should not be allowed to obscure other important reasons for the arrangement here attacked.

The entire argument completely ignores the vital fact that unlike the "typical consumer" (whatever that means) who buys his coal from a producer who owns the coal, has the legal right to sell it and mines and sells it in his own right and for his own account, in the case at bar the contractor does not own the coal and does not and can not in his own right and for his own account sell or otherwise dispose of it. He is entitled to

* See testimony of Dr. C. S. Duncan before subcommittee of House Ways and Means Committee, July 26, 1935, hearings on H. R. 8479, "Stabilization of Bituminous Coal Mining Industry," G. P. O. 1935, p. 470:

"Gentlemen, as to captive mines, if I may take some further time to give my view on that, in 1924 the railroads owned and were operating 135 such mines and produced that year about 27,000,000 tons of coal. The railroads have captive mines because the cost of fuel is an important item to them, amounting to around 6% percent of their operating expenses. They have a discriminating demand for coal, differing for freight service from that of passenger service, and its other uses in shops. They must continuously have an adequate supply of the right kind of coal, and frequently the annual demand for a certain kind of coal will vary within a year as much as 250 percent.

"And furthermore, the railroads having a constant kind of demand for coal, find that they do not need the preparation given for general commercial coal in sizing, screening, and so forth."

See also statement of Thomas Moses, *ibid.*, p. 300.

mine it only because employed by respondents for that purpose, and can mine only at such times and in such quantities as he may be directed by the railroad. He cannot and does not in his own right or for his own account sell or otherwise "dispose of" the coal to respondents, the consumers, who are the sole owners of the coal and who alone have the right to dispose of it. While the compensation paid by respondents to the contractors for their service in mining and loading the coal is a part of the cost to respondents of the coal produced at the mines and consumed by them, it is in no sense and cannot by any play on words be converted into a "purchase price" for the coal.

No sale or other transfer of title to the coal by the producer occurred or could occur.

The facts disclosed by the record do not warrant any finding that a sale or other transfer of title to the coal *by the producer* occurs. The evidence (R. pp. 71, 83, 87, 97, 126, 163, 205, 241, 534, 539, 541) is clear, unequivocal, uncontradicted and conclusive that respondents own the coal both before and after severance* and that the contractor has no title or interest in the coal, no right or power to sell or otherwise transfer title thereto or to consume, use or otherwise dispose of the coal. Title to the coal vests, at least from the instant of removal, in respondents and they are the sole motivating force in mining the coal. The contractors are entitled to mine the coal only by reason of

* Whether respondents actually own the coal in place, under the law of West Virginia, is not material here, since they absolutely control it as against all persons. Exclusive mining rights of this kind are the equivalent of and are ~~generally~~ regarded as ownership.

generally

their employment by respondents to mine it (R. pp. 70, 536, 540, 542).

References on pages 4 and 5 of petitioners' brief to D. H. Pritchard as President of Chilton Block Coal Company, to ownership by his wife of a controlling interest in the stock of that company and to acquisition by respondents of the right to mine the coal at that mine by a *sub-lease* from Chilton Block Coal Company are, if relevant at all, which we deny, apparently designed to convey the implication that in legal effect some sale or transfer of title to the coal by the contractor occurs. This reference to a *sub-lease* of such mining rights by Chilton Block Coal Company to respondents is misleading and wholly erroneous. Respondents' title and right to the coal at this mine is not derived by *sub-lease* from Chilton Block Coal Company but by assignment and transfer of the original lease, assented to by Dingess-Rum Coal Company, the landowner, and whereunder respondents acquired the exclusive right to mine coal at this mine from and in direct privity with the landowner and became responsible directly to the landowner for the royalty payments and for compliance with the other terms and provisions of the lease (R. pp. 240, 241).

In such circumstances and under elementary legal principles Chilton Block Coal Company was thereupon divested of all of its former title and interest in the coal here involved at this mine and the title or interest in the coal vested in respondents by grant from and in direct privity with Dingess-Rum Coal Company, the landowner, and the assignment with consent had the legal effect of imposing upon the respondents all the burdens of the lease. 2 R. C. L.,

pp. 625, 626, and cases cited, including *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N. C. 368.

In the note appended to page 5 of their brief, and in the apparent effort to give some color to their argument that the transactions at the William-Ann mine involved in effect some sale or transfer of title to the coal by the contractor, petitioners refer to a lease bearing the same date as the lease to respondents from the landowners to D. H. Pritchard, to begin immediately upon the termination of the lease by the landowners to respondents. In that note petitioners assert that such lease to Pritchard was made "in order to induce the lessors (landowners) to make a short term lease with respondents." There is no evidence in the record to support the assertion that the lease to Pritchard was made for any such purpose, and it is not a fact. The testimony of Mr. Tynes, Vice-President of United Thacker Coal Company (R. pp. 138, 139, 140 and 141) effectually refutes such assertion and shows clearly that the landowners made the lease to respondents because of their belief that it was a desirable and amply secure business arrangement and risk and that their motive in making the lease to Pritchard (of which lease respondents had at the time no knowledge or information and in the negotiation of which they did not participate, R. p. 139), was to insure operation of the mine after a possible termination of the lease to respondents and for the estimated period of time before the supply of unmined coal under the lands would be exhausted. The lease from the landowners to Pritchard was expressly made subject and subordinate to the

lease to respondents and any extensions or renewals thereof (R. p. 139).

Obviously the motive of the landowners in making the lease to Pritchard can have no possible bearing and in no way support the contention by petitioners that a sale or transfer of title to the coal here involved by the contractor occurred.

The Director's determination that respondents are not producers of the coal, within the meaning and intent of Section 4-II(1), was not supported by any evidence, and was and is plainly erroneous as a matter of law.

The operating arrangements whereby the railroad mines its coal are in furtherance of and not contrary to the remedial purposes of the Act.

We do not understand very clearly the argument (Brief, pp. 32-33) that an affirmance of the decision of the Circuit Court of Appeals will disrupt the beneficent scheme of the Act. Apparently it is feared that a sort of system of chattel slavery will ensue, under which skilled mine operators will be bought and sold by the head. They will sell themselves to the owners or lessees of coal lands "at prices still depressed by the oversupply of the market" (Brief, p. 35), and will be "tied indefinitely to powerful consumers" p. 36). The Malthusian principle of "overplus of blossom" will flood the land with carloads of distress independent contractors, awaiting sales to large consumers at less than cost.

To come back through the looking-glass, we invite a brief review of the familiar condition of the industry

which gave rise to the Bituminous Coal Act. These conditions were described in detail in *Appalachian Coals v. U. S.*, 288 U. S. 344, 361-364, and they embraced the effects of the introduction of substitute fuels, the sale of "distress coal," the shipment of unsold coal, "pyramiding," and divers sharp and unfair competitive practices, resulting in the sale of coal throughout the country at less than the cost of production. As the Bituminous Coal Commission* said:

"This situation threatened to repeat the grave consequences which prices below costs have frequently had before in the industry. The money losses lead to widespread bankruptcy, impoverishment of workers and of mining communities, and shrinkage in local tax revenues. Such consequences in one of the Nation's largest industries tend to spread their retarding effect throughout not only the food, clothing, and mine-supplying industries, but into the whole national economy.

"It was to meet such a situation, recurrent through the 1920's and threatening to follow from the collapse of prices at the end of the National Industrial Recovery program, that Congress enacted the Bituminous Coal Act of 1937 in order to place a flooring under coal prices.

"The means adopted by Congress to stabilize the industry is through a system of minimum prices, f.o.b. transportation facilities at the mines, governing code members in the sale of their coal. The minimum prices are supplemented by standards of fair competition to be

* Third Annual Report, *supra*, at p. 5.

observed by Code members and by rules and regulations governing the marketing of their coal."

The remedy was to support the price which operators would obtain, not for their services, but for "*their coal*." Nowhere in all the literature on the subject†, so far as we are aware, is there any responsible assertion that captive production was a ponderable factor in the problem. Indeed, it is and must necessarily be excluded from any analysis of the condition of the industry. As the Commission said (*ibid.*, p. 4):

"This statement of losses is based on the operations of the established commercial mines. It does not include the so-called "captive mines," affiliated with the consumers, whose income accounts are hardly indicative of conditions among the commercially competitive mines."*

None of the unfortunate conditions which have been prevalent in the commercial coal industry can exist with respect to the operations here involved. The contracts assure the payment by the railroad of every cost of operation, plus reasonable compensation to the contractor. Stable and continuous production in accordance with the needs of the railroad is provided, carrying with it the uninterrupted employment of labor at rates of pay established through collective bargaining. No over-supplied market, no distress coal, no

† Collected in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 395, 396. See also Rostow, "*Bituminous Coal and the Public Interest*," 50 Yale L. J. 543 (February, 1941).

* Thus in *Appalachian Coals v. U. S.*, 288 U. S. 344, 357, captive tonnage was excluded in calculating the proportion of total production controlled by members of the association.

shipments of unconsigned coal in search of a remote and unknown buyer, no sharp competitive practices are possible. Not one of the objects of Congressional solicitude is present.

In this situation it is absurd to say that producers will surrender their "independence and mobility" (p. 36)*, and indenture themselves to consumers at "depressed prices." The contracts in this case are renewable for periods of three or four years at the option of the railroad. It is inconceivable that any operator would offer to take such a contract unless it bound the coal owner to pay all the costs, as these contracts do, in addition to reasonable compensation for his managerial services.

So long as the machinery established by the Bituminous Coal Act functions to fix the prices for commercial coal at levels which will yield a return above the cost of production, the evils of depressed prices and unfair competitive practices cannot exist and there can be no economic "pressure" by consumers, large or small, which can result in lowered wages or other detrimental social conditions. The argument addressed against the methods of production adopted by the respondents could be made with equal pertinence against any captive production whether carried on by the consumer-owner in person or by employees. It is obviously true that as captive production increases, the demand for coal on the open market declines. It

* We call attention to the inconsistency of this argument with petitioners' assertion (pp. 39, 40) that the contractors are engaged in "entirely separate business enterprises," and that "they operate on their own account and for their own benefit, and are in no respect subject to respondents' control in the conduct of the mining business." Of course these last statements are utterly at variance with the actual situation disclosed by the record.

is equally obvious, however, that captive production cannot produce the evils sought to be reached by this legislation and that it was expressly excluded from the scope and operation of the statute.

The Act is not intended and does not purport to fix the wages or compensation which the owner of coal in the ground must pay for the service of extracting it for his own use, and any criticism of such arrangements must be presented to Congress and not to this Court.

IV.

The Act, if construed to apply to the leases and contractual arrangements hereunder, is beyond the power of Congress under Article I, Section 8, Clause 3 of the Constitution, and is a violation of the due process clause of the Fifth Amendment.

Petitioners state (Brief, p. 50) that the effect of a denial of the exemption will not be to compel the respondents to pay to their contractors minimum or Code prices fixed pursuant to the Act for commercial sales, but say that respondents will be entitled to allocate the price paid among the various persons entitled to share therein. The effect of an attempt to thus split an amount of money fixed by reference to the Code price between the landowner and the contractor would be to assert the regulatory power of Congress over (a) the royalty contract between the fee owner and the railroad, and (b) the contract for the compensation of the contractor for his services in extracting the coal. While it seems obvious to us (it was equally plain to the Circuit Court of Appeals) that the Act does not in any sense purport to regulate either the consideration paid for the acquisition of coal in the ground or compensation for the service of mining, it is submitted that if the Act be so construed then it is in both aspects beyond the power of the Congress under the commerce clause. Insofar as Congress might otherwise have the power to regulate royalty payments in coal leases or the compensation for service contracts under the commerce clause, if the present Act be construed as exerting such power it is arbitrary and would deprive respondents of their liberty and property without

due process of law, in violation of the Fifth Amendment.

- (i) *Congress has no power under the commerce clause to regulate the price paid for the service of mining coal, or the consideration for a conveyance of land or mining rights.*

We do not understand that the recognition by the Supreme Court in recent cases of the broad power of Congress to regulate commercial transactions in or directly affecting interstate commerce has in any way impaired the established principle that the function of mining in and of itself is not interstate commerce.* *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 178; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 260.

In *Carter v. Carter Coal Co.*, 298 U. S. 238, this Court said:

"We have seen that the word 'commerce' is the equivalent of the phrase 'intercourse for the purpose of trade.' Plainly the incidents leading up to and culminating in the mining of coal do not constitute such intercourse. * * *"

* * *

"Extraction of the coal from the mine is the aim and completed result of local activities. Commerce in the coal mined is not brought

* Cf. *City of Atlanta v. National Bituminous Coal Commission*, 26 Fed. Sup. 606 (D. C., D. of Col.) February, 1939, dismissed without opinion 308 U. S. 517, at page 608, where, in rejecting the contention of the City that Congress had no power to fix prices for bituminous coal, the lower court said: "Consequently the challenge to the exercise of Federal power must be considered in the light of this concession and of the well-established law that although the production of coal in and of itself may not constitute interstate-commerce the sale and shipment of that coal, or the contracting to sell and ship to customers in another State does." (Emphasis supplied.)

into being by the force of these activities, but by negotiations, agreements and circumstances entirely apart from production. Mining brings the subject matter of commerce into existence. Commerce disposes of it."

We do not understand that the *Sunshine* case† purports to overrule the traditional view, which was reiterated in the *Carter* case, that the mere operation of mining coal in and of itself is an intrastate activity not subject to regulation by Congress. The Act is now sustained as a legitimate regulation, not of coal mining or leases, but of commerce in coal. Thus reliance is placed upon the statement in the dissenting opinion in the *Carter* case of Mr. Justice Cardozo that "to regulate the price for such transactions is to regulate commerce itself, and not alone its antecedent conditions or its ultimate consequences." The *Carter* case is simply distinguished as not pertinent to the regulation now attempted. The opinion says: "There is nothing in the *Carter* case which stands in the way. The majority of the Court in that case did not pass on the price-fixing features of the earlier Act. The Chief Justice and Mr. Justice Cardozo, in separate minority opinions, expressed the view that the price-fixing features of the earlier Act were constitutional. We rest on their conclusions for sustaining the present Act." (310 U. S., at 397, 398).

In re-enacting (with immaterial modifications) the provisions of the Guffey Act regulating commercial transactions in coal, Congress recognized the validity of the Court's holding in the *Carter* case that those

†310 U. S. 381.

portions of the Act which attempted to regulate the mere production of coal as such through the regulation of wages, hours and working conditions, was invalid as an invasion of the province of the States. No attempt was made in the present Act to assert any power over these matters, and a construction of the price regulatory provisions which would operate, as proposed by the Director in this case, to regulate not sales or prices but the actual operation of mining, would run counter to the constitutional limitation recognized in the *Carter* case, the *Oliver Iron Mining Co.* case, the *Heisler* case and others, and acquiesced in by the Congress when it omitted the labor provisions of the original legislation. It cannot be presumed that Congress intended by indirection and implication to regulate the service and function of extracting the coal apart from any commercial sale, but if such be the construction of the Act it goes beyond the commerce power.

Currin v. Wallace, 306 U. S. 1, is cited by the Director in support of the constitutionality of his application of the Act (R. p. 551). This case sustained the validity of the Tobacco Inspection Act of 1935 against the objection that it was beyond the power of Congress under the commerce clause. But in that case the Court was careful to point out that the Act applies only to commercial transactions involving the sale of tobacco in interstate commerce. The Act is a regulation of marketing practices which directly involve sales in interstate and foreign commerce and is the same type of regulation sustained in a long line of cases beginning with *Stafford v. Wallace*, 258 U. S. 495.

It is undeniably true that this Court has, in *U. S.*

v. *Darby Lumber Co.*, No. 82, present term, recognized the power of Congress to deal directly with matters commonly regarded as of local concern, as a proper means of regulating interstate commerce. It is axiomatic, however, that the validity of a particular regulation depends upon the nature of the Congressional objective sought to be attained and the presence of a logical and reasonable connection between the regulation and the objective.

The means chosen must be appropriate to the end sought.*

As this Court has said, "It is obvious that the commerce power is as much dependent upon the type of regulation as its subject matter." *Virginian Ry. Co. v. System Federation*, No. 40, 300 U. S. 515, 557.

Even assuming that Congress could, after investigation and upon proper legislative findings, enact appropriate legislation with respect to the lease or production of coal as such, upon a showing that these activities had a direct effect upon the movement and character of interstate trade, no such investigation has been had. The effect of consumer production by means of leases and mining contracts has not been discussed or debated, there has been no Congressional finding as to the necessity for any such Federal regulation, and no discussion of or finding as to the type of regulation which might be appropriate. Insofar as the matter has been adverted to at all, every conclusion has been in the negative, i. e., that coal produced under the control of a consumer who owns it or has the exclusive

* *Railroad Retirement Board v. Alton Ry.*, 295 U. S. 330, 362, 368; *Nebbia v. New York*, 291 U. S. 502, 525, 537.

right to extract it while in place does not and cannot have any effect upon the commercial problems which have had the attention of the Congress.

The argument of petitioners on this point (Brief, pp. 49-52) largely begs the question by treating it simply as a matter of price-fixing. This approach involves the basic error of failing to distinguish between the price of an article of trade and the cost of reducing to possession something already owned or controlled. The assertion that regulation of the payment for services or royalties "bears a close relation to the fixing of interstate prices" is self-contradictory in this case, since there are no prices here to be fixed. The question is whether in the absence of sales or prices Congress can go "back to the land" and regulate something else—the compensation for personal services and the consideration for the conveyance of an interest in land.

A connection between this lease-service arrangement and commerce is said to lie in "competition" between the two, for the reason that "if producers can dispose of their coal" in this way, "they will obtain an advantage over their competitors who comply with prices established under the Act (Brief, p. 50). Again we point out that, assuming the contractors to be "producers" in some sense, it is not *their coal*, and they have nothing in the way of a commercial article to "dispose of." They cannot therefore possibly be in competition with those who sell coal. The railroad here, as in the case of any captive producer, has simply withdrawn this coal, and, to the extent of its production, its own demand, from the market, and the contractors have withdrawn from production and from commerce. They are merely managing an ac-

tivity for the railroad, as a part and in furtherance of its operations.

- (ii) *The Act, if construed to regulate the royalty payments or operating contracts here involved, would violate the Fifth Amendment.*

If the Act could be construed as authorizing the piecemeal regulation of the royalty provisions of the lease contracts and the compensation for services under the operating agreements as asserted by petitioners, the result would be an arbitrary interference with the Receivers' freedom of contract and would deprive them of their property without due process of law, in that the attempted interference would be totally unrelated to any legitimate end which the Congress has the power to achieve or which it has sought to achieve by the Act. The declared purpose of the Act and its entire regulatory scheme is aimed at "the sale and distribution in interstate commerce of bituminous coal." The Act sets up no standards for the guidance of its administrators in regulating or controlling the compensation of fee owners or of mining contractors. Even if the Act authorized the application here attempted, the application would bear no reasonable relation to the end sought to be achieved in the Act or to any other legitimate aim of Congress. The regulation of the service contracts or of the royalty agreements here involved could not possibly have any tangible effect upon market prices generally nor upon competitive practices in the commercial coal industry.

The effect of an attempt to increase the amount to be paid by the Receivers, either to the contractor or to

the landowners would simply arbitrarily take money from the receivership estate and give it to the contractors or landowners without thereby accomplishing any tangible or legitimate regulatory end, thus depriving the Receivers of both the liberty of contract and of their property without due process of law. Any attempt to require the Receivers to divide between the landowner and the contractor an amount of money which has been fixed by the Director with reference to royalty transactions between other parties, the cost of operating other mines, taxes, depreciation, and depletion allowances, and selling and administrative costs involved in the operation of numerous coal businesses by other people (Sec. 4-II(a)) which are not present as elements of cost in any aspect of the transactions involved on this record would be too plainly arbitrary to require elaboration of argument to demonstrate its invalidity. Such a requirement would necessarily result either in depriving the Receivers of the excess value of the coal in place over the amount which they have agreed to pay as royalties, or would compel them to pay for the personal and local services of the contractor in extracting the coal amounts in excess of those agreed upon, or it would have both of these arbitrary and confiscatory effects. No such result is possible under the Constitution.

To hold, as the Director has held here, that an owner or lease-holder of coal lands must pay a contractor hired to dig his coal an amount based upon calculation of a minimum fair price for coal as a merchantable commodity, leaving unregulated the wages, salaries and other production costs of the owner who digs his coal through agents or servants of a

different legal description, would also be a discrimination unwarranted by any Congressional finding or mandate either in being or potential.

The result would be a windfall to the contractor or the landowner, or both, in an amount approximating one hundred and fifty thousand dollars a year, when both have admittedly already received full compensation according to their agreements. The huge amounts which they would receive would constitute net income to them, and would be taken from an interstate public utility which is unable to pay its debts. We are confident that this Court will never approve the accomplishment of such a crushing injustice.

Respectfully submitted,

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Norfolk, Virginia,

March 10, 1941.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 18.

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE
INTERIOR,

Petitioners,

v.

LEGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY,

Respondents.

**BRIEF FOR RESPONDENTS IN REPLY TO
SUPPLEMENTAL BRIEF FOR PETITIONERS
ON REHEARING.**

W. R. C. COCKE,

JOS. F. JOHNSTON,

Attorneys for Respondents.

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**BRIEF FOR RESPONDENTS IN REPLY TO
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Respondents' main argument has been presented in their brief filed at the last Term. This brief is filed in reply to the supplemental brief for petitioners on rehearing, is confined to the points raised and arguments of petitioners thereon contained in petitioners' brief and it is not to be inferred that respondents by the filing of this brief abandon or waive any of the contentions or arguments by respondents contained in their main brief. For convenience the statements and

arguments of respondents contained in this reply brief are grouped under the same captions as are used in the supplemental brief for petitioners.

I.

THE FUNDAMENTAL ISSUE.

As stated, and for the reasons set forth, in Section I of respondents' argument (pages 18 to 27, inclusive, of their main brief) respondents contend that Section 4-II of the Bituminous Coal Act of 1937 applies only where there is a sale of or other transfer of title to the coal by the producer and to transactions or commerce in such coal which is sold or the title to which is otherwise transferred by the producer and that as the record in the case clearly shows and as found by the unanimous decision of the court below (R. 577) the transactions under review here involve no such sale or title transfer, the provisions of Section 4-II of the Act have no application to these transactions. That it was the intent of Congress not to subject to the provisions of Section 4-II coal or transactions or commerce in or in respect thereof which involve no sale of or other transfer of title to the coal by the producer is made abundantly clear by the Enacting Clause (Section 1) of the Act and by the express provisions contained in Section 4 of the Act.

The question as to whether or not in these transactions any sale of or other transfer of title to the coal by the producer occurs must be considered throughout in the light of the basic and undisputed fact that there is never, from the time respondents executed the operating contracts with their contractors to the time

when the coal is burned in the railroad's locomotives, any sale of or transfer of title to the coal between the contractors and respondents. As the record clearly shows, the contractors each definitely disclaimed any title or interest whatever in the coal and title to the coal is vested at all times in respondents (R. 97, 126). The contractor is throughout his operation performing work upon the property of others in which he admittedly has no interest whatever. The coal after being loaded in the cars supplied by respondents is shipped by respondents to themselves at various points for use in their operations and none ever reaches any other consumer. Under these circumstances we say there can be no reasonable doubt about the proposition that this coal is never within the field of operation of the regulatory scheme established by the Bituminous Coal Act. The long and bitter history of the conditions in commerce in bituminous coal in this country has been recently reviewed by this court and need not be here repeated. These conditions resulted, as the court has pointed out in *Appalachian Coals v. United States*, 288 U. S. 344, and in *Sunshine Anthracite Coal Company v. Adkins*, 310 U. S. 381, in the demoralization of price structures in interstate commerce in coal resulting from the advent of competing fuels and excess productive capacity, coupled with the prevalence of unfair competitive practices, and these were the evils sought to be remedied by Congress by the Act.

Every word and every phase of the Act, beginning with its Enacting Clause (Section 1) emphasizes the preoccupation of Congress only with price regulations and transactions in coal which is sold or the title to

which is otherwise transferred by the producer. That Section 4 of the Act applies only to coal which is so sold or the title thereto so otherwise transferred is clearly recognized and confirmed in the provisions of Section 4-A of the Act, which is supplementary to Section 4. Section 4-A expressly provides in effect that when the Commission shall have found that the transactions in coal in intrastate commerce directly affect interstate commerce "thereafter coal *sold*, delivered or offered *for sale* in such intrastate commerce shall be subject to the provisions of Section 4."

The existence of what is commonly known as captive coal was fully known to Congress and to students of the problem and this type of production has been consistently ignored as not constituting a factor requiring Congressional attention.

The court below has held that the coal involved in this case is not within the scope of the Act and that the primary purpose of the Act was to provide for the fixing of prices for the sale of coal after it has been removed from the ground. (R. 577.)

Petitioners (Sup. Br. 2, 3) seek to bolster their contention that Section 4 is not limited to transactions involving a sale of or other transfer of title to the coal by citing as indicative that such was the Congressional intent the statement (contained in the part of Section 4 which immediately precedes Part I of that section) that the provisions of Section 4 "*are intended to regulate interstate commerce in bituminous coal*" and apply to "*matters and transactions (italics theirs) in or directly affecting interstate commerce in bituminous coal.*" Respondents assert that such cited provisions were

obviously inserted only as indicative of the Constitutional ground upon which the power of Congress in the enactment of Section 4 of the Act is based; that the scope and application of the bituminous coal code provisions authorized in Section 4 to be promulgated are in no sense enlarged by such quoted provisions of Section 4 and that such scope and application are to be determined by the provisions of Part II of Section 4 unaffected by the above mentioned preliminary statement in Section 4 of the ground on which the legislative enactment is based.

Petitioners (Sup. Br. 3) cite the provisions of Section 4-II(e) that "no coal subject to the provisions of Section 4 'shall be sold *or delivered or offered for sale*' (italics theirs) at a price below the minimum or above the maximum established by the Commission," and point to the use of the disjunctive form of expression as sustaining their contention that Section 4-II of the Act is not limited in its application to matters and transactions which involve a sale of or other transfer of title to the coal by the producer. As above stated, and as more fully set forth in Section I of respondents' argument in their main brief, the entire Act, beginning with its Enacting Clause (Section 1), points unmistakably to the intent of Congress to limit and restrict the application of the provisions of Section 4-II of the Act to transactions in coal which is either sold or the title thereto otherwise transferred by the producer.

As evidencing the attitude in other cases it is significant that the Director in the matter of *Varney & Rose*, Docket No. 1538-FD, decided on July 28, 1941, holds that "the essence of the Bituminous Coal Act

is price regulation," and in his Cease and Desist Order, issued on July 26, 1941, in Dockets Nos. 1548, 1549, 1550, 1553 and 1554-FD, that "whatever the 'problem' may be, the stubborn fact is that the scheme of regulation and control provided in the Bituminous Coal Act is centered around the price provisions."* This is clearly the view of the court below in holding that Section 4-II of the Act applies only where a sale of or other transfer of title to the coal by the producer is involved, that in the case at bar no such sale or title transfer occurs, no price upon which Section 4-II can operate exists, and that the provisions of Section 4-II are inapplicable to the transactions under consideration herein.

The contention of petitioners (Sup. Br. 3, 4) that the substance of the transactions under review is that respondents agreed to buy their coal from two persons—an owner of coal lands and a coal mine operator—and to pay each separately; that such transactions are no different from that of a sale and that the sole effect of placing the mineral rights in the name of respondents was to avoid a technical transfer of title from the operator to respondents, are wholly at variance with the facts as disclosed by the record. Such an argument ignores the fundamental facts—abundantly shown by the record—that in the case of each of the three mines the contractual engagements and obligations as between the landowners and respondents on the one hand and as between the contractor and respondents on the other hand are entirely separate and distinct and are evidenced by separate instruments which by

*Decisions and orders of the Director are issued in mimeographed form and are not reported.

their terms and in legal effect are in each case binding only as between the parties to such instruments; that the lease from the landowners to respondents granted respondents and respondents alone the exclusive right to extract and mine the coal, or cause same to be extracted and mined, for respondents' own consumption and imposed royalty payments and other obligations set forth in the leases (or by appropriate reference therein) upon respondents which are enforceable by the landowners only against respondents. Such royalty payments and other obligations are assumed by respondents under the William Ann mine lease under sections 3 to 11, inclusive, of that lease (R. 225-228, inclusive), in the Glamorgan mine lease in sections 3, 4 and 5 thereof (R. 164-166, inclusive), and in the Chilton Block No. 1 mine lease in articles 5, 7, 8 to 10, inclusive, 12, 13, 17, 18, 21, 22, 24 and 26 of the lease of Dingess-Rum Coal Company to Chilton Block Coal Company (referred to on page 241 of the record), the performance of which is expressly imposed upon and assumed by respondents under their agreement with Dingess-Rum Coal Company (R. 241).

Clearly if respondents should default in the payment of the royalties specified in their agreements with the landowners or in any of the numerous other obligations imposed upon respondents thereunder, respondents and respondents alone would be answerable in damages.

The fact that the leases from the landowners to respondents and the agreements of respondents with the contractor employed by respondents to extract, mine, load and ship the coal to them for their exclusive

consumption are co-extensive in duration or contain provisions which would enable respondents at their option to terminate both the leases and the operating contracts simultaneously can not make the contractor the owner and seller of the coal produced at these mines. The arguments of petitioners upon this point involve a conception that respondents acquired the right to take the coal from the land and agreed to make payment of the royalties directly to the landowners for account of and under some imagined species of agency for the contractor. Petitioners assert that on the facts, as disclosed by the record, such a theory is wholly unsupported, ignores completely the contractual rights and obligations of the instruments as between the landowners and respondents, in respect of which the contractor occupies no relation whatever of privity, and is highly fantastic and wholly unsound.

Petitioners contend (Sup. Br. 4) that respondents have not made any investment in coal lands. The record shows clearly the contrary. Respondents are obligated to pay the landowners minimum royalties amounting to approximately \$30,000 per year. They are obligated to pay, and have paid, the tax of one cent (1c) per ton, or more than \$6,000 per year, levied by Section 3(a) of the Act; are also obligated to pay and have paid taxes assessed against the land and mineral rights at the William Ann mine amounting to over \$9,000, and in the William Ann and the two other mine cases numerous other taxes which are included in the compensation paid the contractor. As hereinbefore stated, respondents and respondents alone are obligated to the respective landowners not only to pay the minimum royalties but to perform the numer-

ous other obligations assumed by respondents under the leases, and respondents alone are answerable to the landowners for the breach of such obligation.

Respondents are bound under their contracts to reimburse the contractor through adjustment of the tonnage compensation rate paid the contractor for his services for every cost involved in the process of mining which is beyond the contractor's control, which costs include wages, taxes, mining equipment and supplies and constitute the major elements of production costs and such contracts protect the contractor against all risks except those attributable to his own inefficiency.

Petitioners devote a considerable portion of their supplemental brief (pages 4 to 9, inclusive), to what they term the interdependence between the leases from the landowners and the agreements with the contractors and argue that the substantive effect of the transactions, considered as integral parts of the same transaction, are no different from that of a sale of the coal by the contractor to respondents. The case of *Helvering v. Le Gierse*, 312 U. S. 531, cited by petitioners in this connection, is clearly not in point and gives no support to petitioners' contention. There the two contracts involved—one a contract of annuity and one of insurance—were between the same parties and were held by the court to be opposite, the one neutralizing the risk inherent in the other. Here the leases are from the landowners to respondents and the operating agreements are between the respondents and the contractors. These instruments are separate and distinct, involve no neutralization of risk or obli-

gation, create no privity relationship of the landowner to the operating agreement or of the contractor to the lease, and in the transactions here under consideration there is no similarity in fact or principle to *Helvering v. Le Gierse*, supra.

In their effort to support their contentions the petitioners wholly ignore the essential and determinative facts disclosed by the record and erroneously state or imply facts at variance with those shown by the record. The leases do not, as petitioners assert, provide for the automatic termination thereof upon termination of the operating contract for any reason whatever. Exercise by the respondents of their right of renewal of the leases is in no way dependent upon renewal by respondents of the operating agreements nor is renewal of the operating agreements by respondents in any way dependent upon renewal of the leases. The William Ann mine lease (R. 205) contains no provision whatever terminating that lease, or giving respondents the right to terminate it, upon termination of the operating agreement. The Glamorgan mine lease (R. 169, 178) only gives respondents the right, if they so elect, to terminate that lease in the event of the exercise by respondents of any right in respondents to terminate the operating contract. The Chilton Block No. 1 mine lease (R. 236, 239, 243) automatically terminates upon termination of the operating agreement only in the event of termination of the latter agreement in the exercise by respondents of the right of termination for a cause specified in that agreement. On the other hand the William Ann lease unquestionably continues unaffected in the event of termination of the operating agreement and in that case, in the

case of the Glamorgan lease and in the case of the Chilton Block No. 1 mine lease (if the operating agreement be terminated for any cause other than the exercise by respondents of their right of termination thereunder) respondents would be in position in each case to continue the leases and effect other arrangements for the extraction and mining of the coal.

The arguments of petitioners that respondents do not enjoy any of the privileges of ownership and could never regain the right to extract the coal themselves are wholly unsupported by the facts. Each of the leases gives the respondents and respondents alone the right to extract and mine the coal or cause same to be extracted and mined for their own consumption and prohibits the assignment by respondents of such rights without the previous written consent of the landowners. The sole and exclusive right and title to the coal, the *jus disponendi*, is by the terms of the leases and in law vested in respondents and the coal is being extracted and mined in the right and as the property of respondents. The extracting and mining of the coal through the instrumentality of the contractor employed by respondents to perform such service for them, and the disposition of which by respondents is, under the uncontradicted evidence in the case, within the sole dominion of respondents, clearly constitute the exercise and enjoyment by respondents of privileges of ownership. Further evidence of the enjoyment by respondents of ownership privileges in the coal is shown by the fact (R. 190, 263, 301, 326) that each of the operating contracts provides that so-called "house coal" sold is sold for account and as the property of respondents. In the face of the facts above stated,

which are clearly established by the record, the statement that respondents do not enjoy any of the privileges of ownership of the coal produced at these mines and could never regain the right to extract the coal themselves is simply untrue. As well say that the owner of building materials acquired for use in the construction of a house for his own use, who employs a carpenter to build the house for him, by such employment loses his privileges of ownership of the materials. That such employment is an exercise and enjoyment and not a relinquishment of the privileges of ownership of the materials is, we think, self-evident. The further argument of petitioners that because the leases and operating contracts are co-extensive in duration it results that respondents part with the right to themselves extract the coal is not only factually incorrect but provides no logical support for petitioners' contention that in effect the transactions are sales of coal by the contractors to respondents. The contractors extract the coal solely by virtue of their employment by respondents to perform that service for them and they neither have nor claim title to or ownership or right of disposition of the coal. Respondents are the sole causative force in the production of the coal and we are unable to perceive how the performance by the contractors for respondents of the service of extracting and mining the coal for a period co-extensive with the leases can possibly operate to vest in the contractor any ownership of the coal or make him the seller of the coal.

Petitioners further contend (Sup. Br. 9) that while the contracts were in effect the contractors were forced to compete with other producers. This argument

assumes the contractor to be the producer of the coal, a contention completely refuted by respondents' argument contained in their main brief (Brief pp. 59, 60, 61).

On page 10 of their brief petitioners argue that approval of the transactions here involved would result in similar arrangements by consumers of small amounts of coal. The hypothetical case of a small consumer is readily distinguishable from the transactions here. In the instant cases the leases give respondents the exclusive ownership of all coal extracted from the mine, obligate respondents to pay royalties on all of the coal so extracted, during the period of the lease, and make capable of definite and ready identification the coal in which title in the respondents vests. Obviously in the case of a small consumer these conditions would not exist.

II.

RESPONDENTS' ARGUMENT BASED UPON THE PROVISIONS OF SECTION 3.

Petitioners' argument (Sup. Br. 11) under this heading consists of two contentions—first, that the transactions involved are in substance sales of the coal by the contractor to respondents, that the contractor is the producer and that on such theory the coal is coal sold by the producer and subject on that ground to Section 3—the tax provisions of the Act. Petitioners' second contention is that even if, as respondents contend, the transactions do not constitute sales of the coal by the contractor they must be considered as a "disposal" of the coal, as that term is defined in Section 3 of the Act. Respondents submit that these

contentions are effectually refuted by their argument on pages 26, 27, 39, 40, 56, 57, 58 and 59 of their main brief. Admittedly, the tax imposed by Section 3 is only upon coal when sold or otherwise disposed of by the producer. If, as petitioners contend and respondents deny, the contractor, who, as the undisputed evidence shows, neither has nor claims any right to sell, consume, use or dispose of the coal, is the producer of the coal, respondents reassert that no field for application of the tax provisions of the Act would exist.

Respondents contend that in the facts of this case the activities of the contractor in loading and shipping the coal are in no sense a disposal of the coal by the contractor within the meaning and intent of Section 3 of the Act. The coal is the property of respondents in which the contractor admittedly has no rights of ownership or disposition. It is shipped by the contractor as the agent of respondents to respondents and consumed by them. The acts of the contractor in loading and shipping the coal, even assuming such acts constitute a disposal thereof within the meaning of Section 3, which respondents deny, are acts exercised by the contractor in the right of respondents and can constitute no disposal by the contractor of the coal. Clearly it is not the intent of Section 3, applied to this case, to treat the acts of loading and shipping the coal by an agent for his principal as a taxable "disposal" of the coal.

III.

RESPONDENTS' ARGUMENT THAT THEY BEAR THE
BURDEN OF THE MINING OPERATIONS.

It appears from petitioners' supplemental brief (pp. 11, 12) that they have [as indeed they must under *Phelps-Dodge Corporation v. National Labor Relations Board*, No. 387, October Term, 1940, decided April 28, 1941] abandoned their former contention, denied by respondents, that the exemption provisions of Section 4-II(1) of the Act apply only to producers engaged in the business of mining coal. Respondents reaffirm the contentions in their main brief (pp. 15, 41) that even assuming that the phrase "engaged in the business of mining coal" as used in Section 17(c) of the Act is at all determinative of the right of exemption of respondents under Section 4-II(1), respondents do, as fully explained in their main brief, bear the burden of the mining operations, are clearly the causative force of the production of the coal and are "engaged in the business of mining coal," if this latter requirement be a determinative factor of their right to exemption under Section 4-II(1) of the Act. (R. pp. 51 to 56, inclusive). The phrase "engaged in the business of mining coal" as used in Section 17(c) is not used in a technical jurisdictional sense, but with reference to the economic activity or enterprise of coal mining, including the sale or other disposal of the property. Since respondents absolutely control the mining of the coal and pay all the costs, they are engaged in the business and they are the producers within the intention of this section.

The word "producer" as used in Section 4-II(1)

is of broader significance than the term as partly defined in Section 17(c) and is employed therein having reference to all the provisions of the Act. The Act applies to the two following classes of coal:

(i) Coal owned in place and after its extraction consumed by the same owner thereof;

(ii) Coal owned in place by one owner and disposed of after extraction by sale or otherwise to another and different owner.

Coal of both classes is dealt with in Section 3--the tax section of the Act. It seems plain that coal exempted by virtue of Section 4-II(1) of the Act includes coal of the first class which is produced either by the owner thereof personally or through agencies or instrumentalities employed by such owner. Coal produced personally by the owner in place or through such agencies or instrumentalities is subject to the tax levied by Section 3(a). As we have pointed out above, respondents have regularly paid the tax as the producer of this coal.

Petitioners erroneously state or imply (Sup. Br. 15) that respondents have no control over the rates of pay and salaries over which the contractor has control. The provisions giving respondents such control, referred to by petitioners as in the original contracts, have never been modified or changed and are still of full force in the William Ann and Chilton Block mine contracts and in practical effect in the Glamorgan mine contract. The effect of the renewal in April, 1937, of the Chilton Block mine contract was not, as petitioners state, to eliminate paragraph 7(a) of the original contract or to substitute therefor paragraph

(3) of the renewal agreement. This paragraph (3) does not relate in any way to the provisions of paragraph 7(a) of the original contract giving respondents such control and such provisions are unaffected by the 1937 renewal agreement (R. 316, 317). This clearly appears from paragraph (7) of the last mentioned agreement which continues such provisions of paragraph 7(a) of the original agreement in full force. In the case of the Glamorgan mine, as in the other two cases, in each successive renewal or extension of the contract the revised compensation of the contractor was fixed in conference with him in which he submitted his estimate of production cost, including any increases in rates of pay and salaries over which he had control affecting such cost, and such increases were included in his revised compensation only if and when approved by respondents.

IV.

THE EXTENSION OF THE STATUTE.

The discussion of the petitioners under the above heading in their supplemental brief (p. 16) can have no influence upon the decision of this case. The report of the Senate Committee (Sen. Rep. No. 169, 77th Cong. 1st Sess.) is no more a disapproval of the decision of the Fourth Circuit Court of Appeals (114 F. (2d) 752—R. 573, 580) and of this court than it is an approval. Language more appropriate could have been used to indicate this fact, but a reading of the statement made to the committee by Mr. Abe Fortas, General Counsel for the Bituminous Coal Division of the Department of the Interior (Hearings before a Senate

subcommittee of the Committee on Interstate Commerce, 77th Congress, 1st Session, or S. J. Res. 22, S. J. Res. 32, H. J. Res. 101, and H. R. 4146, April 2nd and 3rd, 1941, pp. 18 to 30) makes it very clear that the inclusion of the language quoted on page 16 of petitioners' supplemental brief was inserted at the request of Mr. Fortas and was not designed to indicate a disapproval of the decision of the Circuit Court or of the Supreme Court. On pages 18 and 19 of the Committee Report is the following:

"MR. FORTAS: It would be a tough case; a very difficult case. The committee knows of the doctrine of legislative affirmance of a court decision. It may be that if the committee recommended to the Congress that this act be extended, and if the Congress extended this act without steps such as I shall indicate in a moment, the court would say that that amounted to a legislative confirmation of the Supreme Court decision, and we would not have a run for our money when we brought the case up for rehearing before a full bench.

"We ask the committee, therefore, in its report, if it sees fit to do so, to indicate very clearly that its recommendation to the Congress is not intended to include an implication that it approves the decision of the Supreme Court. We are not suggesting an amendment to take care of the Supreme Court decision at this time, because we believe that we can get it changed on reargument; and also, frankly, we would have a great deal of difficulty in drafting an amendment which would spell out what we believe to be the intention of Congress any more clearly than it is spelled out now in the act.

"SENATOR BONE: Would we not ourselves be confronting something of a dilemma?

"MR. FORTAS: I do not think so, Senator Bone. It seems to me that the committee could properly indicate that it is taking no action one way or the other on this matter, in view of the fact that a petition for rehearing is to be filed.

"SENATOR BONE: You suggest, then, that that be in the nature of a statement in the committee report rather than something that would be an attempt to enact a law?

"MR. FORTAS: Yes, sir; I do."

The report of the committee does not in any way indicate what action either or both houses of Congress would have taken had the whole matter been thrown open to discussion.

CONCLUSION.

The decision below should be affirmed.

Respectfully submitted,

W. R. C. COCKE,

JOS. F. JOHNSTON,

Attorneys for Respondents.

L. B. PLUMMER,

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Of Counsel.

No. 603

In the Supreme Court of the United States

OCTOBER TERM, 1940

H. A. GRAY, AS DIRECTOR OF THE BITUMINOUS COAL
DIVISION OF THE DEPARTMENT OF THE INTERIOR,
AND HAROLD L. ICKES, AS SECRETARY OF THE
INTERIOR, PETITIONERS

v.

LEIGH R. POWELL, JR., AND HENRY W. ANDERSON,
AS RECEIVERS OF SEABOARD AIR LINE RAILWAY
COMPANY

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT*

PETITION FOR A REHEARING BEFORE A FULL BENCH,
AND MOTION THAT THE ISSUANCE OF THIS COURT'S
MANDATE BE STAYED UNTIL THE FINAL DISPOSITION
OF THE CASE

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(I)

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Come now the petitioners, H. A. Gray, Director of the Bituminous Coal Division of the Department of the Interior, and Harold L. Ickes, Secretary of the Interior, by the Solicitor General, and respectfully pray for a rehearing of this case before a full bench.

Respondents instituted this action by filing in the Circuit Court of Appeals for the Fourth Circuit a petition to review a decision of the Director of the Bituminous Coal Division of the Department of the Interior denying respondents' application for exemption from the regulatory provisions of the Bituminous Coal Act of 1937 for certain coal from three mines which respondents claimed that they operated. The findings of the Director reveal that respondents, a consumer of coal, leased mineral rights to coal lands and at the same time, in an interrelated and dependent agreement, contracted with a coal operator to have the operator mine the coal and ~~was to~~ assume, and indemnify respondents against, all liabilities, burdens and risks attendant upon the coal mining business. Respondents, in their application for exemption, contended that coal mined from these lands by the operator and consumed by respondents is "consumed by the producer" within the meaning of the exemption contained in Section 4 II (1) of the Bituminous Coal Act. The Director decided to the contrary, however, and denied the application for exemption. The court below reversed, holding that the Director's decision was unsupported by substantial evidence and based upon error in law. This Court granted certiorari on the Government's petition and, on March 31, 1941, affirmed the judgment below by an equally divided Court, eight members participating in the decision.

An authoritative determination of this case by this Court is important to the administration of the Bituminous Coal Act. The decision below approves a device through which the price provisions of the Act may readily be evaded by the mere formality of making the consumer rather than the producer the lessee of the mining rights. If that decision properly construes the law, any consumer may be able to purchase coal at prices below those established under the Act by simply leasing from the landowner the right to mine a specified amount of coal and contracting with the coal operator to pay him separately for extracting and shipping that amount. It is significant that, both before and since the decision in this case by this Court, 24 applications for exemption have been ~~sent~~ with the Director of the Bituminous Coal Division claiming exemption on substantially the same facts as those here involved. In these circumstances, the desirability of final settlement of the question by this Court is obvious.

The importance of the issue is emphasized by the action of Congress in enacting H. R. 4146, extending the provisions of the Bituminous Coal Act for a period of two years from April 26, 1941. This measure was passed by the House of Representatives on March 27, 1941, and by the Senate on April 4, 1941; it was signed by the President on April 12, 1941. Since this statute was passed by the House before this Court's decision

in the present case, which was rendered on March 31st, only the Senate was able to consider the effect of the decision. The report of the Senate Committee on Interstate Commerce on H. R. 4146 (S. Rep. No. 169, 77th Cong., 1st Sess., p. 3) states expressly that acceptance of the bill as it passed the House, without amendment, "is not intended, either expressly or by implication, as ratification or approval in any respect of the interpretation of the act by the Fourth Circuit Court of Appeals or the Supreme Court of the United States in the case in question."

The failure of the Senate to amend the bill as it passed the House so as expressly to disapprove of the result reached by the court below in this case is explained by the urgent need for dispatch in the enactment of the measure. In the Senate report the Committee stated (p. 4):

It is particularly important that expeditious action be taken to extend the life of this act because it expires on April 26, 1941, and because extension of the act may assist in the prompt adjustment of the differences between the mine workers and operators which have led to a suspension of the mining of bituminous coal.

And on the floor of the Senate, Senator Barkley urged that the bill not be amended in any fashion because this would mean that it would have to go back to the House for reconsideration, with

a resultant delay in final enactment of the measure. 87 Cong. Rec. 3096, 3097 (advance ed.).

On numerous occasions, particularly in recent years, this Court has granted a rehearing before a full bench following a decision by an equally divided Court where the absence of a full bench at the first hearing was due to a cause other than disqualification. *Home Insurance Co. v. New York*, 119 U. S. 129, 148; 122 U. S. 636; 134 U. S. 594. *Selma, Rome & Dalton R. R. Co. v. United States*, 122 U. S. 636-637; 139 U. S. 560. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 586, 158 U. S. 601, 602-607. *United States v. Sisco*, 260 U. S. 697-698; 260 U. S. 701, 262 U. S. 165. *Railroad Commission of California v. Pacific Gas & Elec. Co.*, 301 U. S. 669, 302 U. S. 771, 302 U. S. 388. *United States v. One Ford Coach*, 305 U. S. 564; 305 U. S. 666; 307 U. S. 219.

We respectfully request the Court to stay issuance of its mandate and to defer decision upon the petition for rehearing until Mr. Justice McReynolds' successor has taken office. There is precedent for thus postponing action until later developments indicate what disposition of the petition is appropriate. In *W. H. H. Chamberlin, Inc. v. Andrews*, 299 U. S. 515, an equally divided Court on November 23, 1936, affirmed a decision sustaining the validity of the New York unemployment insurance law. A petition for re-

hearing before a full bench was filed but was not acted upon until May 24, 1937, when the petition was denied (301 U. S. 714). On that day the full Court upheld the constitutionality of the unemployment compensation law of Alabama. *Carmichael v. Southern Coal Co.*, 301 U. S. 495.

As the mandate of this Court will issue under Rule 34 on April 25, 1941, it is respectfully moved that the issuance of the mandate be stayed until the final disposition of the case.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

ABE FORTAS,
General Counsel,
Bituminous Coal Division,
Department of the Interior.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Acting Solicitor General.

APRIL 1941.

SUPREME COURT OF THE UNITED STATES.

No. 18.—OCTOBER TERM, 1941.

H. A. Gray, as Director of the Bituminous Coal Division of the Department of the Interior, et al.,
Petitioners,

vs.

Leph R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[December 15, 1941.]

Mr. Justice REED delivered the opinion of the Court.

Respondents, receivers of the Seaboard Air Line Railway Company, seek from the Bituminous Coal Division of the Department of the Interior an exemption of certain coal from the Bituminous Coal Code on the ground that they were both the producer and consumer of the coal. If Seaboard is held to be a producer-consumer, it is entitled to an exemption by virtue of Section 4-II(1) and Section 4-A. These sections together with others pertinent to the discussion are set out in a note below.¹

The application for exemption was filed before the National Bituminous Coal Commission August 4, 1937. The first hearing was in September 1937 before the examiners for the Commission.

¹ Bituminous Coal Act of 1937, 50 Stat. 72, 15 U. S. C. § 828 *et seq.* (1940). "SEC. 3. (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise tax of 1 cent per ton of two thousand pounds.

The term 'disposal' as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market

After the passage of the Reorganization Act of 1939, 53 Stat. 561, and the acquiescence of Congress in Reorganization Plan No. II, 53 Stat. 1433, a division headed by a Director was established by the Secretary of the Interior known as the Bituminous Coal Division. Order No. 1394, as amended by Order No. 1399 of July 5, 1939, 4 F. R. 2947. Thereafter the hearings proceeded before the Division and the order denying the exemption was passed by the Director, June 14, 1940. Better practice might have suggested a dismissal since the Director found Seaboard was not a producer. Subsequently Seaboard sought review under Section 6(b) and obtained the decree, now under consideration, reversing the Director's order. The opinion accompanying the decree held that the facts of this case brought the Seaboard under the classification of producer. 114

value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

SEC. 4. The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5(a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

PART II—MARKETING.

(e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code: *Provided*, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

(1) The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

SEC. 4-A. Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and inter-

F. 2d 752. As the question of federal law was important² and unsettled by any decision of this Court, certiorari was granted, J. C. § 240(a), 311 U. S. 644, and the decree below affirmed by an equally divided Court, 312 U. S. 666. The present consideration is upon a petition for rehearing. 313 U. S. 596.

Seaboard, a coal-burning railroad, is a large consumer of bituminous coal. The arrangements here in question are with three mines but as there are no significant differences in the plans by which the coal is extracted, we shall describe the contracts relating to one only, the William-Ann Mine, owned by the United Thacker Coal Company and the Cole and Crane Real Estate Trust.

state commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 . . . may file with the Commission an application verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. . . . Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. . . . Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6.

SEC. 6. . . . (b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . .

SEC. 17. As used in this Act—

(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.'

The Bituminous Coal Act of 1937, 50 Stat. 72, has been extended to April 26, 1943. Act of April 11, 1941, Pub. Law 34, 77th Cong., 1st Sess.

² Cf. Consolidated Indiana Coal Co. v. National Bituminous Coal Commission, 103 F. 2d 124; Keystone Mining Co. v. Gray, 120 F. 2d 1, decided after allowance of certiorari.

This was the earliest arrangement. It originated in May, 1934, when the coal code of the National Industrial Recovery Act was in effect.³ The first step was a lease of coal lands by the Seaboard from the landowners which granted to Seaboard the right to mine coal for fourteen months with the privilege of yearly renewals which originally were not to run beyond June 30, 1939. Successive extensions have continued its effect since that time. During the spring of 1936 two extensions of six weeks each were agreed upon, specifically in view of the case of *Carter v. Carter Coal Co.*, 298 U. S. 238, decided May 18, 1936. The *Carter* case involved the Bituminous Coal Act of 1935, the predecessor of the present act. A per ton royalty, as rent, was reserved to the landowners with an annual minimum of \$16,200 payable quarterly. The lease was terminable on fifteen days notice, if the landowners terminated the contractor's lease, about to be referred to, for the contractor's default.

The second step in this arrangement was for the landowner lessors of the lease just described to lease simultaneously to a contractor selected by Seaboard the mining equipment on the demised premises consisting of buildings, tipples, machinery and other appurtenances necessary or convenient for extracting the coal. This equipment was sufficient for reasonably economical mining. It was further provided in the coal lease that the term and the renewal privileges of the equipment lease should be coextensive with those of the coal lease.

The final step was an operating contract between the contractor, Daniel H. Pritchard, referred to in the land lease as the lessee of the facilities for mining, and Seaboard for the extraction of the coal by the contractor or supplier and the delivery of it to Seaboard for consumption. This contract also was made simultaneously with the coal lease. It contained a provision requiring the contractor to obtain a lease of the mining equipment in accordance with that segment of the entire plan referred to in the preceding paragraph. For a flat per ton cost on a sliding scale dependent upon volume, the supplier agreed to mine the coal. His compensation was subject to variation by fluctuations in costs beyond his control such as taxes, wages, machinery and explosives. Alternatively, payment could be made on a cost basis plus ten cents per

³ National Recovery Administration, Registry No. 702-45, Approved Code No. 24, Code of Fair Competition for the Bituminous Coal Industry, promulgated September 18, 1933. Article VI listed selling below code price as an unfair practice.

ton for the contractor's compensation. This operating contract ran for the same term and had the same renewal privileges as the coal lease contract heretofore described and has been continued in effect by extensions made for the same terms as the extensions of the coal lease. The supplier was called an independent contractor in the document. This he was, at least in the sense that he managed the mining in his own way without a right of direction in Seaboard. He agreed that the coal supplied would be clean, i.e., free of non-combustible matter, and would pass inspection of Seaboard for compliance with its specifications. The supplier paid and assumed all obligations to the landowner except the royalty, including taxes. He carried employer's liability and casualty insurance, and agreed to bear the cost of all repairs, additions or betterments even under the alternate cost plus plan, as well as those described as commissary or welfare expenses. Seaboard, in an extension agreement, obtained the privilege of termination on sixty days' notice, if the supplier defaulted by not lowering his contract price to meet the market price of similar coal.

The landowner, the contractor and Seaboard by this series of coordinated and synchronized contracts caused the entire output of the mine to be delivered to Seaboard for its consumption at a fixed price, subject to variations for factors beyond the supplier contractor's control. The alternative cost-plus plan was not employed. Under the contractor's agreement, the contractor assumed all risks of operation, as heretofore explained, and all obligations of Seaboard to the landowner except the royalty payments. This made a fixed cost to Seaboard for coal of supplier's contract price plus the royalty per ton as rent. It was a short term, one year, contract with the price controlled by the market in view of the competitive price provision. Seaboard furnished no facilities or equipment for mining or loading.

The other two arrangements, one with the Glamorgan Coal Lands Corporation, landowner, and Glamorgan Coals, Inc., the operator, for which latter corporation Peerless Coal Corporation is substituted by consent, and the other with Chilton Block Coal Company and the Dingess-Rum Coal Company, landowners by lease and in fee, and Daniel H. Pritchard, operator, vary only in details from the William-Ann contracts set out above.

From the several arrangements the Seaboard obtained about half of its annual requirements estimated for 1936 at one million tons. There is no question as to the interstate character of the commerce

involved. The coal is mined in Virginia and West Virginia and consumed in a number of other South Atlantic states.

The Bituminous Coal Act of 1937 followed the invalidation of the Bituminous Coal Conservation Act of 1935 by *Carter v. Carter Coal Co.*, 298 U. S. 238, and the abandonment of the N.R.A. Code of Fair Competition after the decision in *Schechter Corp. v. United States*, 295 U. S. 495. These legislative enactments sought a solution of the economic difficulties of the soft coal industry, which were bringing bankruptcy to operators and an even worse condition, unemployment, to the miners. Each time legislation was attempted, the conclusion was reached that price stabilization offered the best remedy. The industry found the same answer. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344. This Court has determined that the present 1937 act is within the constitutional powers of Congress. *Sunshine Coal Co. v. Adkins*, 310 U. S. 381.

This purpose of stabilization of conditions through a fixed price scheme met a difficult problem in the captive coal mines. The 1935 act taxed the value of such coal at the mine. It defined captive coal as including "all coal produced at a mine for consumption by the producer or by a subsidiary or affiliate thereof." 49 Stat. 1008. As the coal consumed by a producer apparently was deemed by Congress when considering the present act not to offer the same disturbing effect to prices as non-code, open market coal,⁴ a method of exemption was provided. Sections 4-H(1) and 4-A, note 1, *supra*. Congress, however, did not define exempt coal as it had captive coal in the 1935 act. While a definition was inserted in the Senate⁵ it was eliminated in the conference report.⁶ As a

⁴ Testimony of Chairman Hosford of the Bituminous Coal Commission, Hearings before Committee on Interstate Commerce, U. S. Senate, 74th Cong., 2nd Sess., on S. 4668, pp. 32 and 33.

⁵ 81 Cong. Rec. 3136, 75th Cong., 1st Sess.

⁶ "It is proposed, on page 30, line 17, to strike out the period after the word 'him', and to insert a comma and the words 'and for the purpose of this subsection the term 'producer' also includes all individuals, partnerships, and corporations which are found by the Commission, upon the effective date of this act, bona fide and not for the purpose of evading the provisions of this act, to be owned by, or to be under common ownership with, a producer, provided such a producer does not sell any part of his production on the commercial market.' . . . The purpose of the amendment is simply to extend the exception carried by subsection (1), on page 30, so as to include under the definition of the word 'producer' a wholly owned subsidiary or other legal entity having identical ownership. That is the whole purpose."

"The question is on agreeing to the amendment offered by the Senator from Ohio."

"The amendment was agreed to."

⁶ H. Rep. No. 578, 75th Cong., 1st Sess., pp. 1, 8.

result the determination of exempt coal was left to the administrative body. Section 4-A, note 1, *supra*.

Determination of Producer. We are thus brought squarely to decide whether the Director's finding that Seaboard is not the producer of this coal is to be sustained. By Section 4-A, note 1, *supra*, the determination of this issue rests with the Director, subject to the review, as obtained herein, by a Circuit Court of Appeals, provided by Section 6(b). Section 4-A states: "Any producer believing that any commerce in coal is not subject to the provisions of section 4 . . . may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. . . . Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application." In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by Sections 4-II(1) and 4-A, the function of review placed upon the courts by Section 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. *Shields v. Utah Idaho R. Co.*, 395 U. S. 177, 180, 181, 184, 185, 187.

Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests of price stabilization upon the one hand and producer consumption upon the other. By thus committing the execution of its policies to the specialized personnel of the Bituminous Coal Division, the Congress followed a familiar practice.⁷ Of course, there is no difference between the skill of employees in a division of a department and those in a board, commission or administration.

⁷ Treasury—*United States v. Johnston*, 124 U. S. 236, 249; Interior—*Swamp lands—Northern Pac. Ry. Co. v. McConnas*, 259 U. S. 387, 392; Customs Appraisers—*Passavant v. United States*, 148 U. S. 214, 219; Post Office—*Bates & Guild Co. v. Payne*, 194 U. S. 196.

Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. *United States v. Louisville & Nashville R. R.*, 235 U. S. 314, 320; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304; *Helvering v. Clifford*, 309 U. S. 331, 336. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action.

Congress could not "define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations." *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194. Just as in the *Adkins* case the determination of the sweep of the term "bituminous coal" was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of "producer." The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Consumers of bituminous coal are naturally desirous of obtaining supplies free of the tax and free of the risk and investment typical of production. If independent contractors are employed for extraction, there is an obvious breach in the full consumer-producer identity. This may create consequences which would not follow if

the enterprise itself, through its own employees, accomplished the same ultimate result. Often in the law, the selection of a particular business form as, for instance, carrying on a common business through two corporations, may create legal liability, *Edwards v. Chile Copper Company*, 270 U. S. 452, 456, although such relation to other connections may result in diversity of legal treatment. Compare, for instance, *United States v. Delaware & Hudson Co.*, 213 U. S. 366, and *United States v. Del., Lack. & West. R. R.*, 238 U. S. 516.

The shortness of the leases, the freedom from investment in coal lands or mining facilities, the improbability of profit or loss from the mining operations, the right to cancel when cheaper coal may be obtained in the open market, all deny the position of producer to the railroad.

We view it as immaterial that the Company might have itself operated a captive mine and so escaped the price provisions of the act by virtue of the exception of Section 4-II(1), note 1, *supra*. It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers. Cf. *Superior Coal Co. v. Department of Finance*, 36 N. E. 2d 354, 358, 360. The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan. *Higgins v. Smith*, 308 U. S. 473, 477.

Code Coverage. Seaboard contends that the coal here involved is not affected by the code Section 4-II because there is no sale or other transfer of the title to the coal by the producer. As to this point, in Seaboard's view, since it as lessee of the mineral rights is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes, it is immaterial whether or not it or its suppliers of the coal are determined to be the producer. Support for the conclusion that there must be a transfer of title to bring the coal under the Code, Section 4-II, is found by Seaboard in the preoccupation of Congress in sales, which attitude it feels is shown by the continuous reference in the provisions of the Act to sales or other transfers of title. Further support is drawn for the position by reference to Section 3(a), where "disposal" is declared to include consumption by a producer or any transfer of title other than by sale. Reliance is placed also on Section 3(b), which by a tax of 19½ per cent

of the selling price impels adherence to the code when coal "which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4A" is sold or otherwise disposed of by the producer.

Had we held that Seaboard was the producer, the pertinency of this argument would disappear because Seaboard would be both producer and consumer and therefore this coal would be entitled to exemption under Sections 4 H (1) and 4-A. As we determine otherwise, however, it is essential to examine the soundness of the position asserted by Seaboard, to wit, that coal produced by the instrumentalities is not subject to the provisions of Section 4-H for the reason that it is not sold nor otherwise disposed of by the producers. We conclude that coal extracted under the circumstances of this case is within the scope of the code provisions of Section 4-H.

Examination of the code discloses that minimum prices for code coal are fixed by joint action of the district boards and the Director, Section 4 F (a), H (a). Thereafter no code coal may be sold at prices less than the fixed minimum except at the risk of severe penalties. Code coal is that produced by code members, i.e., coal producers who accept membership in the code. Section 5 a). All producers of bituminous coal within the statutory districts are eligible for membership, and therefore all coal produced by any of these producers is potentially code coal. The code regulates the coal and not the producer. In order to force the eligible coal within the code, an excise tax of 19½% of the sale price is placed upon all bituminous coal "sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code" with a blanket exemption from this tax of sales or other disposal by code members.

The core of the Act is the requirement that coal be put under the code or pay the 19½ per cent excise. We said in *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 392, that the sanction tax applied to non-code members. Since they were not members, it was there contended that their coal would not be subject to the code, but it was explained in the *Adkins* case that the code was intended to apply to sales "in or directly affecting interstate commerce in bituminous coal," Section 4, 3rd paragraph, and that non-code coal "would be" subject to the code when it was interstate coal or coal affect-

ing interstate commerce and therefore subject to the regulatory power of Congress. So here, the purpose of Congress which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party, within the ambit of the coal code. We find no necessity to so interpret the act. This conclusion seems to us in accord with the plain language of Section 3(a) and (b) providing for a tax on "other disposal" as well as sale. The definition of disposal as including "consumption or use by a producer, and any transfer of title by the producer other than by sale" cannot be said to put a meaning on disposal limited to the inclusion. Cf. *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, No. 76 this Term, decided November 10, 1941, and cases cited page 3 of slip opinion. It is true that Section 4-11 (c) speaks of a violation of the price provisions by "sale or delivery or offer for sale of coal at a price below" the minimum without reference to "other disposition," the phrase generally used, but the failure to include these words at that point does not, we think, justify an interpretation that coal covered by the code may be disposed of otherwise than by a transfer of title without penalty. We think the language of Section 5(b) relating to findings on orders punishing for violation of the code shows this to be true. It reads so far as pertinent as follows:

" . . . the Commission shall specifically find . . . the quantity of coal sold or otherwise disposed of in violation of the code . . . : the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder." 50 Stat. 84.

This conclusion is fortified by an examination of the tax section of the 1935 act from which the present Section 3 is obviously derived. In the first or 1935 act captive coal was taxed along with other coal. The tax was laid upon the "sale or other disposal of all bituminous coal produced within the United States." It was "15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine." 49 Stat. 993, § 3. Evidently the draftsman thought of the sale of free coal and of the "other disposal" of captive coal. See further, on the question of the meaning of a sale, *In re Bush Terminal Co.*, 93 F. 2d 661, 663.

Finally, respondent contends that if the act is construed to apply to the contractual arrangements just considered it is beyond the power of Congress under the Commerce and Due Process Clauses of the Constitution. This is said to be so because there is no power in Congress to regulate the price paid for the service of mining coal or the consideration for mining rights and to do so would violate the Fifth Amendment. We are in this review by certiorari determining only the question of whether the Seaboard is a producer under the act. Congressional power over that problem is beyond dispute. *Currin v. Wallace*, 306 U. S. 1; *United States v. Darby*, 312 U. S. 100; *Sunshine Coal Co. v. Adkins*, 310 U. S. 381.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Mr. Justice ROBERTS.

I think the judgment should be affirmed. There are limits to which administrative officers and courts may appropriately go in reconstructing a statute so as to accomplish aims which the legislature might have had but which the statute itself, and its legislative history, do not disclose. The present decision, it seems to me, passes that limitation.

The case involves an Act of Congress which, in implementing its declared purpose and intent, carefully delimits by inclusive and exclusive definition those who shall and those who shall not be subject to its regulatory provisions. Upon a record in which there is not a single disputed fact, the bare question is presented whether the words the Congress used bring the respondents within the Bituminous Coal Code or exclude them from its operation. In answering that question the Director made no controverted finding of fact, exercised no judgment as to what the relevant circumstances

were, but merely decided that the meaning of the statute was that the respondents' transactions required that they become members of the Code or suffer the penalty of the 19½% tax for failing to join the Code. If the Director was in error his error was a misconstruction of the Act which created his office and that error, under all relevant authorities, is subject to court review. It is specifically made so subject to review by the statute in question.¹

The Bituminous Coal Act, as its preamble declares, is aimed at the regulation of prices and unfair methods of competition in the marketing of bituminous coal in interstate commerce² as the means of promoting that commerce and relieving it from practices and methods which burden and obstruct it. The body of the Act is confined to the enforcement of these purposes and none other.

To accomplish the declared end, the statute adopts a comprehensive scheme for the regulation of prices and trade practices in the marketing of bituminous coal in interstate commerce. It creates a Commission and, by § 4, directs the Commission to promulgate a Bituminous Coal Code to which coal producers who are "code members" are made subject. By Part II of § 4 the Commission is given authority to fix minimum and maximum prices for code members in conformity to specified standards. Subdivision (i) of § 4, Part II, specifies methods of competition in the marketing of coal which are declared to be unfair and violations of the Code.

Section 3(a) imposes a tax of 1% per ton on all coal "sold or otherwise disposed of by the producer" and defines disposal, for the purposes of this section alone, as including "consumption or use" by a producer and any transfer of title by a producer other than by sale. The acknowledged purpose of this subsection is the levy on all coal taken out of the ground, and used by whomsoever, of a small tax to pay the expense of the administration of the Act. The respondents admit their liability for this exaction. They have paid this tax and no question arises in respect of it.

Section 3(b), as a means of securing compliance with the regulatory provisions of § 4, imposes a penal tax of 19½% of the sale price of the coal, or of its fair market value when disposed of otherwise than by a sale, on all the coal sold or otherwise disposed of by a producer to whom the regulatory provisions as to price and unfair methods of competition included in § 4 are applicable. Only

¹ Section 6(b) and (d).

² *Sunshine Coal Co. v. Adkiss*, 319 U. S. 381, 388, 293.

those who are producers of coal and would be subject to the provisions of the Code are liable to the penalty tax as an alternative to joining the Code and thus coming within the regulatory provisions applicable to such Code members. Such regulatory provisions are concerned only with those who sell or market coal.

Subdivision (1) of Part II of § 4 declares: "The provisions of this section shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." The respondents insist that this subsection plainly exempts them from becoming members of the Code and that, in pursuance of the subsection, the Director should have granted their application for exemption.

Some stress is laid by the petitioners on § 17(c) which declares that:

"As used in this Act,

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

It seems plain enough that this provision was not intended to nullify subsection (1) of § 4, Part II. The evident purpose was to make it clear that, under whatever form the business was done, the operator should come under the applicable provisions of the statute. This subsection has no relevance to the question presented in this case.

The term "producer" is not a technical term or a term of art, but the statute has not left the Director or the courts without guides respecting the meaning of the word as used in the statute. It is the Director's duty to observe those guides in applying the statute and, if he fails so to do, it is the obligation of the courts to observe them in performing their statutory duty to review his determination. The context, the purposes of the Act, and the means adopted to carry them into effect, make clear the meaning of the word "producer" as used in the statute. This court obviously fails in performing its duty and abdicates its function as a court of review if it accepts, as the opinion seems to do, the Director's definition of "producer" and then proceeds to accommodate the meaning of related provisions to the predetermined definition. So to do is a complete reversal of the normal and usual method of construing a statute.

The legislative history³ demonstrates, and the opinion of the court concedes, that the purpose of § 4 (Pt. II(1)) was to exclude from the provisions of the Act regulating prices and other matters of competition in interstate marketing, coal produced from "captive mines": that is, coal produced by the owner of a mine and consumed by him without placing it on the market. It is, as it must be, also conceded that subdivision (1) excludes from the operation of the Act one who mines coal by his own employes, upon land owned or leased by him, and consumes it in his business or industry. The only possible differentiation between the respondents' method of conducting the business and that of the usual captive mine lies in the fact that the respondents' coal is mined by an independent contractor instead of by employes. That circumstance, however, will not justify the statement that respondents do not produce the coal any more than it would justify the statement that they would not transport coal to themselves, within the meaning of the Act, if they shipped it by a common carrier who was an independent contractor. The circumstance that the coal is mined by a contractor instead of an employe, or transported by a common carrier, cannot have any more, or any different, effect upon the subjects of regulation,—prices and unfair methods of competition—in the one case than in the other. In both cases the owner would consume coal which would otherwise come on the market. In neither case would the coal be brought into competition with marketed coal. In each case the owner would remain free to buy coal on the market whenever the market price fell below the cost of production at his own mine.

Subdivision (1) cannot appropriately be construed to deny respondents the right to be excluded from the operation of the Act upon their application as provided in § 4-A when there are plainly no affirmative provisions of the Act subjecting them to its regulation. It will hardly be denied that, by respondents' total operation, coal is produced. If they are not the producers, because they pay a contract price instead of wages for its production, they are not subject to the 19½% tax which applies only to producers; and they are thus exempt from the only sanction which would compel them to become Code members subject to the regulatory provisions of the Act. Since they market no coal, the provisions of § 4 relating

³ Hearings before the Committee on Interstate Commerce of the Senate, 2d Sess., 74th Cong., on S. 4668, pp. 32, 33.

to prices and methods of competition in the marketing of coal are not applicable to them. On the other hand, if the independent contractor whom respondents employ to mine the coal is deemed the producer of the coal, he likewise is exempt from the regulatory provisions and also exempt from the 19½% penal tax. For, even if he be called a producer, he neither markets nor sells the coal and he cannot be said to dispose of coal which he does not own. Disposal must mean something more than physical production, delivery, or transportation of the coal of another. If it were otherwise, the superintendent of a captive mine would be subject to the tax because he is engaged in mining coal and delivering it to the owner who consumes it. It is well known that in many coal fields coal is gotten out by employing a miner who in turn employs his own gang to assist him in the mine. If the Director's position is correct, this method of operation would subject the owner and operator of a captive mine to regulation under the Act. That view would be plainly untenable.

The vice in the construction which the court now adopts, apparently only because the Director has adopted it, lies in the fact that this construction is of practical significance only as it is preliminary to regulation of features of the coal industry other than prices and methods of competition in the marketing of coal. Congress has not seen fit to prescribe such regulation. It is clear that the attempted subjection of respondents to the control of the Commission is without congressional authority.

The CHIEF JUSTICE and Mr. Justice BYRNES join in this opinion.